

Capital Reporting Company
Determinations of Rates and Terms 06-12-2012 - Vol. VI

1587

UNITED STATES COPYRIGHT ROYALTY JUDGES

Washington, D.C.

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In the Matter of:)

Determination of Rates and Terms) Volume VI

Preexisting Subscription)

Services and Satellite Digital) Pgs 1587-1834

Audio Radio Services.) Pgs 1849-1864

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Washington, D.C.

Tuesday, June 12, 2012

The following pages constitute the
proceedings held in the above-captioned matter, held
at the Library of Congress, Madison Building, 101
Independence Avenue, Southeast, Washington, D.C.,
before Matthew P. Spoutz, Court Reporter, of Capital
Reporting Company, a Notary Public in and for the
District of Columbia, beginning at 9:30 A.M.

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1588	<p>1 A P P E A R A N C E S</p> <p>2 Copyright Royalty Tribunal:</p> <p>3 CHIEF JUDGE SUZANNE M. BARNETT</p> <p>4 JUDGE WILLIAM ROBERTS</p> <p>5 JUDGE STANLEY C. WISNIEWSKI</p> <p>6</p> <p>7 On behalf of SiriusXM:</p> <p>8 R. BRUCE RICH, ESQUIRE</p> <p>9 TODD LARSON, ESQUIRE</p> <p>10 MIRANDA S. SCHILLER, ESQUIRE</p> <p>11 RANDI W. SINGER, ESQUIRE</p> <p>12 SABRINA A. PERELMAN, ESQUIRE</p> <p>13 Weil, Gotshal & Manges, LLP</p> <p>14 757 Fifth Avenue</p> <p>15 New York, New York 10153-0119</p> <p>16 Phone: (212) 310-8170</p> <p>17 Fax: (212) 310-8007</p> <p>18 bruce.rich@weil.com</p> <p>19 todd.larson@weil.com</p> <p>20 miranda.schiller@weil.com</p> <p>21 randi.singer@weil.com</p> <p>22 sabrina.perelman@weil.com</p>
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1591	<p>1 C O N T E N T S</p> <p>2 WITNESS: DIRECT CROSS REDIRECT</p> <p>3 RECROSS</p> <p>4 JOHN D. HAUSER</p> <p>5 By Ms. Singer 1595</p> <p>6 By Mr. Handzo 1623</p> <p>7 DAMON WILLIAMS</p> <p>8 By Mr. Fakler 1652</p> <p>9 By Mr. Moskowitz 1707</p> <p>10 By Mr. Fakler 1741</p> <p>11 GREGORY S. CRAWFORD</p> <p>12 By Mr. Cunniff 1746</p> <p>13 By Mr. Levin 1852</p> <p>14</p> <p>15 E X H I B I T S</p> <p>16 EXHIBITS: MARKED RECEIVED</p> <p>17 SiriusXM Trial 24 1597</p> <p>18 PSS Trial Exhibit 3 1653 1660</p> <p>19 PSS Trial Exhibit 4 1753 1754</p> <p>20 SoundExchange Trial 59 1709</p> <p>21 SoundExchange Trial 60 1712</p> <p>22 SoundExchange Trial 61 1715</p> <p> SoundExchange Trial 62 1717</p>

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1592	<p>1 PROCEEDINGS</p> <p>2 CHIEF JUDGE BARNETT: Counsel, at the end of</p> <p>3 the day yesterday I was uncertain how we were going to</p> <p>4 proceed today.</p> <p>5 So, Mr. Rich?</p> <p>6 MR. RICH: I understand, it is subject to</p> <p>7 being corrected, we're going to shift back this</p> <p>8 morning to the conclusion of SiriusXM's direct case.</p> <p>9 As for the continuation of Mr. Del Beccaro,</p> <p>10 I accede to counsel.</p> <p>11 MS. SINGER: Probably the wrong person to</p> <p>12 accede to except it was my understanding that we were</p> <p>13 starting with Dr. Hauser. I thought we were going to</p> <p>14 resume with Mr. Del Beccaro on Thursday.</p> <p>15 MR. FAKLER: That's correct.</p> <p>16 CHIEF JUDGE BARNETT: Okay. Thank you.</p> <p>17 MR. RICH: So if I may start with one bit of</p> <p>18 followup housekeeping. Your Honors requested that we</p> <p>19 provide you with an evidentiary proffer focusing on</p> <p>20 the portions of the Satellite I testimony of Sirius</p> <p>21 and XM witnesses that we wish to include within the</p> <p>22 record of this proceeding.</p>
1593	<p>1 And what is being handed to Your Honors is a</p> <p>2 package which contains a short evidentiary proffer</p> <p>3 organized by witness testimony and identifying in the</p> <p>4 left-hand column the generally limited number of</p> <p>5 paragraphs we are seeking be designated for inclusion.</p> <p>6 And in accordance with the rules, however, we provided</p> <p>7 the complete testimony, including cross-examination</p> <p>8 and redirect examination, and for Your Honors's</p> <p>9 convenience have even yellow lined the passages that</p> <p>10 correspond to the designated portions.</p> <p>11 We have just provided a set of these</p> <p>12 materials this morning to opposing counsel.</p> <p>13 CHIEF JUDGE BARNETT: I would like an</p> <p>14 opportunity to sort of digest this before we do</p> <p>15 anything more with it.</p> <p>16 MS. SINGER: I was going to make the same</p> <p>17 request.</p> <p>18 CHIEF JUDGE BARNETT: Okay.</p> <p>19 MR. RICH: Certainly. If you would like us</p> <p>20 to proceed, Your Honor, we are prepared to call our</p> <p>21 next and last witness. Or did you want to consult</p> <p>22 about this first?</p>
1594	<p>1 CHIEF JUDGE BARNETT: Well, no, I think we</p> <p>2 need time to look it over and think about it, talk</p> <p>3 about it, and we probably will have some follow-up</p> <p>4 questions for you.</p> <p>5 So you may call your next witness.</p> <p>6 MR. RICH: With that, we call our next and</p> <p>7 last witness, Professor John Hauser, who will be</p> <p>8 examined by my partner, Randi Singer.</p> <p>9 JUDGE ROBERTS: Is anybody intending to use</p> <p>10 the projector for a presentation?</p> <p>11 MS. SINGER: Not me.</p> <p>12 JUDGE ROBERTS: So we don't know how it came</p> <p>13 back on?</p> <p>14 MS. SINGER: The projector is gone. They</p> <p>15 came and took the projector piece, but we don't know</p> <p>16 how to get that off.</p> <p>17 (Discussion off the record.)</p> <p>18 CHIEF JUDGE BARNETT: Counsel, would you</p> <p>19 state your name for me again?</p> <p>20 MS. SINGER: Sure. Randi Singer from Weil,</p> <p>21 Gotshal & Manges.</p> <p>22 WHEREUPON,</p>
1595	<p>1 JOHN HAUSER, PH.D.</p> <p>2 was called as a witness, and having been first duly</p> <p>3 sworn, was examined and testified as follows:</p> <p>4 DIRECT EXAMINATION</p> <p>5 BY MS. SINGER:</p> <p>6 Q Good morning, Dr. Hauser.</p> <p>7 A Good morning.</p> <p>8 Q By whom are you currently employed?</p> <p>9 A I'm employed by MIT, the Massachusetts</p> <p>10 Institute of Technology.</p> <p>11 Q And what is your current position at MIT?</p> <p>12 A I am the professor of marketing.</p> <p>13 CHIEF JUDGE BARNETT: And, Professor Hauser,</p> <p>14 before we go too much further, would you state your</p> <p>15 full name and spell your name for the record, please.</p> <p>16 THE WITNESS: My full name is John R.</p> <p>17 Hauser. J-O-H-N, H-A-U-S-E-R.</p> <p>18 CHIEF JUDGE BARNETT: Thank you.</p> <p>19 JUDGE WISNIEWSKI: And, Dr. Hauser, how did</p> <p>20 you come to be associated with Japanese beer?</p> <p>21 THE WITNESS: Well, I think the Kirin</p> <p>22 Company gave MIT a whole bunch of money and --</p>

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1596	<p>1 JUDGE WISNIEWSKI: The usual way then?</p> <p>2 THE WITNESS: Actually they are also a</p> <p>3 pharmaceutical company and soft drinks and tea.</p> <p>4 BY MS. SINGER:</p> <p>5 Q Dr. Hauser, how long have you been a</p> <p>6 professor of marketing at MIT?</p> <p>7 A I've been at MIT since 1980.</p> <p>8 Q I have placed before you what has been</p> <p>9 identified as SiriusXM Direct Trial Exhibit 24.</p> <p>10 Do you see that?</p> <p>11 A Yes, I do.</p> <p>12 Q And do you recognize Exhibit 24 as your</p> <p>13 corrected written direct testimony in this proceeding?</p> <p>14 A Yes, I do.</p> <p>15 Q And is that your signature on the last page</p> <p>16 of the testimony on page 32?</p> <p>17 A Yes.</p> <p>18 MS. SINGER: At this time we would like to</p> <p>19 move into evidence SiriusXM Direct Trial Exhibit 24.</p> <p>20 MR. HANDZO: No objection.</p> <p>21 MR. CUNNIFF: No objection, Your Honor.</p> <p>22 CHIEF JUDGE BARNETT: Exhibit 24 is</p>	1598	<p>1 CHIEF JUDGE BARNETT: Dr. Hauser is so</p> <p>2 qualified.</p> <p>3 BY MS. SINGER:</p> <p>4 Q Dr. Hauser, let's turn to the book of</p> <p>5 demonstratives that you should also have in front of</p> <p>6 you, and if you look at page 2, would you please tell</p> <p>7 us what was your assignment in this case?</p> <p>8 A Yes. I was asked to conduct an Internet</p> <p>9 survey to examine the value that current subscribers</p> <p>10 to satellite radio place on music, other programming,</p> <p>11 and non-programming features of satellite radio.</p> <p>12 In addition, I was asked to parse the value</p> <p>13 of music for music recorded before and after February</p> <p>14 15, 1977.</p> <p>15 Q And what did you do to carry out that</p> <p>16 assignment?</p> <p>17 A I carried out an Internet survey.</p> <p>18 Q At a very general level, what did your</p> <p>19 survey results demonstrate?</p> <p>20 A Well, at a very general level, it indicated</p> <p>21 that respondents were willing to pay \$3.24 for all</p> <p>22 types of music currently played on SiriusXM. In</p>
1597	<p>1 admitted.</p> <p>2 (SiriusXM Trial Exhibit Number 24 was</p> <p>3 received into evidence.)</p> <p>4 BY MS. SINGER:</p> <p>5 Q Dr. Hauser, if you would take a look,</p> <p>6 please, at Appendix A. Appendix A is your CV that was</p> <p>7 current as of October 2011: is that correct?</p> <p>8 A That's correct.</p> <p>9 Q Dr. Hauser, have you previously been</p> <p>10 qualified as an expert in marketing, market research,</p> <p>11 and survey design in any Copyright Royalty Board</p> <p>12 proceeding?</p> <p>13 A Yes, I have, in the previous proceedings in</p> <p>14 2007.</p> <p>15 MS. SINGER: Your Honors, in light of the</p> <p>16 fact that Dr. Hauser has previously qualified as an</p> <p>17 expert and in the interest of time, rather than going</p> <p>18 through the 43 pages of his CV, I'd would like to</p> <p>19 offer him as an expert in marketing, market research,</p> <p>20 and survey design.</p> <p>21 MR. HANDZO: No objection.</p> <p>22 MR. CUNNIFF: No objection.</p>	1599	<p>1 addition, this parses to \$2.11 for music from 1970</p> <p>2 through today.</p> <p>3 Q Have you conducted any similar surveys for</p> <p>4 any other Copyright Royalty Board proceedings?</p> <p>5 A Yes, I did, in 2007.</p> <p>6 Q And what were the results of your 2007</p> <p>7 survey as compared to this survey?</p> <p>8 A The results were really quite similar. In</p> <p>9 fact, they're not statistically different than what we</p> <p>10 obtained previously even though some of the</p> <p>11 methodologies differ in some minor ways.</p> <p>12 Q If you would turn to the third slide,</p> <p>13 please. Can you please describe your approach for</p> <p>14 parsing the market price of satellite radio among</p> <p>15 these various features?</p> <p>16 A Yes, I can. This is a conceptual diagram</p> <p>17 and what it indicates is that we first asked people</p> <p>18 their willingness to pay for a form of satellite</p> <p>19 radio. In this case it's satellite radio as it</p> <p>20 currently is: Full availability of stations, sound</p> <p>21 quality better than FM radio, no commercials, music</p> <p>22 programming, as well as the other types of programming</p>

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1600	<p>1 on the radio.</p> <p>2 We then take away one or more features. In</p> <p>3 this case we take away music programming and again</p> <p>4 asked for the willingness to pay.</p> <p>5 So in this case if this was the question for</p> <p>6 an individual, their valuation would be the</p> <p>7 willingness to pay before the feature was taken away</p> <p>8 minus the willingness to pay after the feature was</p> <p>9 gone -- was taken away.</p> <p>10 Now, there's a complexity here that's very</p> <p>11 important and that is that these seven features</p> <p>12 interact. For example, music and no commercials,</p> <p>13 music and music quality. So the order on which we</p> <p>14 take features away matters.</p> <p>15 For example, if we take music programming</p> <p>16 away first, people are going to give us a fairly high</p> <p>17 value because then you have an XMSirius radio station</p> <p>18 without music.</p> <p>19 On the other hand, if we take away, say, all</p> <p>20 the other features away first, then you're reduced to</p> <p>21 something that's not all that different than FM and</p> <p>22 the residual value of music is very little. So you</p>	1602	<p>1 parse it before and after 1970.</p> <p>2 Q So how did you qualify the respondents?</p> <p>3 A Well, there's a series of questions in the</p> <p>4 survey that determined, for example, whether or not</p> <p>5 they're a SiriusXM customer, what type of service they</p> <p>6 have, whether or not they're the major decision-maker</p> <p>7 in the process, that type of -- set of questions so</p> <p>8 that they're a relevant population.</p> <p>9 Q And if we take look at slide 5, we see S8,</p> <p>10 which stands for screener question eight, correct?</p> <p>11 A Yes. These are some of the types of</p> <p>12 questions. There are others. But this gives an</p> <p>13 example, for example, where respondents are asked to</p> <p>14 identify whether or not they are either the</p> <p>15 decision-maker or they play a substantial role in</p> <p>16 decision-making.</p> <p>17 And as you can see, if they played a minor</p> <p>18 role or they weren't involved in decisions or if they</p> <p>19 weren't sure about this, then they were terminated.</p> <p>20 In addition, it's very important to use what</p> <p>21 are known as quasi-filters -- that's a complicated</p> <p>22 word in the market research industry. It basically</p>
1601	<p>1 get one number if you take it away first, one number</p> <p>2 if you take it away last.</p> <p>3 So in order to get the interactions</p> <p>4 correctly, what we do is we take away these features</p> <p>5 in a random order. So initially it's possible to have</p> <p>6 all possible ordering of these seven really matters,</p> <p>7 whether music is first, second, third, fourth, fifth,</p> <p>8 sixth or seventh. So the final value of music is then</p> <p>9 averaged over all respondents and averaged in a way</p> <p>10 that it accounts for these interactions among the</p> <p>11 features.</p> <p>12 Q Let's take a look at how that worked in</p> <p>13 practice. If you could turn to slide 4, please.</p> <p>14 What were the basic steps in your survey?</p> <p>15 A This, again, is a conceptual diagram. First</p> <p>16 we qualify the respondents. For example, they have</p> <p>17 to --</p> <p>18 Q Well, let's go through the steps and then</p> <p>19 we'll go through...</p> <p>20 A Okay. So we first qualify respondents, then</p> <p>21 we determine the current price, then we ask the</p> <p>22 willingness to pay for features, and then finally we</p>	1603	<p>1 means that we allow them to have answers such as</p> <p>2 "don't know" or "unsure" to a question. So we really</p> <p>3 want to avoid guessing for any of these questions.</p> <p>4 Q You said the next step was that you</p> <p>5 determined the current price.</p> <p>6 How did you go about doing that?</p> <p>7 A Yes. Well, I was asked to parse the market</p> <p>8 price, and in this case if you turn now to slide 6,</p> <p>9 they were asked a series of questions. For example,</p> <p>10 they were shown the various forms of both XM services</p> <p>11 and Sirius services, asked to identify the service</p> <p>12 they have. They were also asked whether or not they</p> <p>13 paid by the month, they paid by the quarter, they paid</p> <p>14 by the year or they have a lifetime subscription.</p> <p>15 And what we then did is from that, by, say,</p> <p>16 knowing which service they had and the way in which</p> <p>17 they were paying, even if they were paying the full</p> <p>18 price, we were able to compute a monthly price so we</p> <p>19 can have everybody on the same basis so we are</p> <p>20 comparing apples to apples and oranges to oranges.</p> <p>21 Q In determining that price did you include</p> <p>22 fees and taxes and various other charges?</p>

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<p>1 A No. We found that when consumers thought 2 about this price, they thought about the overall price 3 without the extra fees, without taxes, and we told 4 them that that was the price they should be thinking 5 about. 6 Q And there has been some testimony earlier in 7 this proceeding about free introductory subscriptions 8 or new car buyers who receive SiriusXM kind of service 9 for an introductory period. 10 Did you include in your survey population 11 people who weren't paying anything for their 12 subscription? 13 A No. The survey is limited to people who are 14 actually paying for the service. A few of those pay 15 slightly less than the current price, and we 16 determined that. 17 Q So your sample, since it didn't include 18 people who weren't paying, may actually be slightly 19 different than the actual market retail price if the 20 average market retail price were calculated including 21 people who weren't actually paying? 22 A That's right. My sample only includes</p>	<p>1 coming out of the box. 2 THE WITNESS: That's right. 3 CHIEF JUDGE BARNETT: So I wouldn't know 4 unless I'm supposed to rely on Nissan to tell me that 5 it's XM and not Sirius. 6 THE WITNESS: That's possible. In which 7 case if you didn't know, you would answer "don't know" 8 and there would be a quasi-filter. 9 CHIEF JUDGE BARNETT: Okay. All right. 10 Thank you. 11 THE WITNESS: All right. 12 CHIEF JUDGE BARNETT: Go ahead. 13 BY MS. SINGER: 14 Q Dr. Hauser, still looking at page 6 of the 15 demonstrative, is it your understanding that, even 16 though there was a merger, that consumers were still 17 able to purchase one package or another in September 18 of 2011? 19 A Yes, during September of 2011. 20 Q So let's go back to the question. How does 21 your survey measure a consumer's willingness to pay 22 for a specific feature?</p>
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<p>1 people paying, and, hence, the average price will be a 2 little bit above the market price. 3 Q Now, how does this survey measure a 4 consumer's willingness to pay for a specific feature 5 of satellite radio? 6 A Well, if we now turn to Exhibit 7, or page 7 7 of the exhibit, this is an example question -- 8 CHIEF JUDGE BARNETT: Before we go to 9 Exhibit 7, or page 7. On page 6, was this survey 10 conducted subsequent to the merger of Sirius and XM? 11 THE WITNESS: Yes, it was. 12 CHIEF JUDGE BARNETT: So buyers of new 13 vehicles had a receiver in the vehicle that was called 14 SiriusXM. So how were they expected to know whether 15 they had Sirius or XM? 16 THE WITNESS: At the actual time when the 17 survey was conducted in September of 2011 this covered 18 what the currently available options were. 19 CHIEF JUDGE BARNETT: Well, I purchased a 20 car in August of 2011 and it had a satellite radio in 21 it. It says "XM" on the button, but I've always 22 referred to it as SiriusXM because that's what I hear</p>	<p>1 A Well, now, again, if we turn to page 7 -- 2 I'd like to point out that the survey was done on the 3 Internet and we actually have screen shots in 4 evidence. So this is a typed version, but this gives 5 one of the many rotations. 6 In this case three options are taken away 7 first. You couldn't listen to the same stations 8 everywhere, sound quality was only equal to standard 9 FM radio, there were as many commercials as on AM and 10 FM radio and then there was no music available. So we 11 would have asked this question before and after music 12 being taken away. And for this particular respondent 13 we would get the number by subtracting the two 14 willingness to pay. 15 Now, to show you that this builds, on page 8 16 we are continuing to build that question and then 17 finally at the end you can see that we take away in 18 this case there were no news, weather, or traffic 19 reports available. So in some cases music would have 20 been taken away last, in some cases it would have been 21 taken away first. In fact, all the orders were a 22 priority equally likely.</p>

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1608	<p>1 Q And in the actual survey a consumer would</p> <p>2 have seen this question seven times with one</p> <p>3 additional feature each time the question was</p> <p>4 presented?</p> <p>5 A That's right, each consumer would have the</p> <p>6 features taken away one at a time, and that allows us</p> <p>7 to actually compute the willingness to pay for each of</p> <p>8 the features.</p> <p>9 Q How did you choose these seven factors?</p> <p>10 A Well, primarily these are roughly equivalent</p> <p>11 to the seven features that I testified about in 2007.</p> <p>12 We did talk to a few consumers to make sure the</p> <p>13 wording was updated, you know, the world has changed a</p> <p>14 little bit, and we did pre-test the survey.</p> <p>15 But overall I believe it's a fairly complete</p> <p>16 set of questions -- set of features, but very similar</p> <p>17 to the prior survey.</p> <p>18 Q Did you do anything to confirm that your</p> <p>19 survey included that these seven features were the</p> <p>20 most important seven features?</p> <p>21 A Well, in addition to the pre-tests, it would</p> <p>22 actually look at what would be the residual value.</p>	1610	<p>1 assignment was to parse the value of music before and</p> <p>2 after 1970.</p> <p>3 Why did you do that?</p> <p>4 A Well, my understanding is that the music</p> <p>5 rights at issue in this case are for music recorded on</p> <p>6 or after February 15th, 1972. However, when talking</p> <p>7 to consumers, they tend to think in decades, so it is</p> <p>8 a very natural question to ask it before and after</p> <p>9 1970.</p> <p>10 This, of course, would favor SoundExchange a</p> <p>11 little bit in that we include those two extra years in</p> <p>12 the measurement for the parsing.</p> <p>13 Q And how did you go about parsing the value</p> <p>14 of music before and after 1970?</p> <p>15 A Well, it was actually a very simple</p> <p>16 question. After a preamble -- and the preamble is in</p> <p>17 evidence, but we can talk about it -- they were</p> <p>18 described the situation and then they were asked to</p> <p>19 allocate a hundred percentage points between music</p> <p>20 before -- actually they listened to music that was</p> <p>21 recorded and released, not necessarily composed and</p> <p>22 written, from 1970 through today versus I can listen</p>
1609	<p>1 The amount that's left after the seven features are</p> <p>2 taken away is really very small.</p> <p>3 For example, in 95 percent of the people the</p> <p>4 residual value is less than 25 cents relative to the</p> <p>5 \$12.95, and, you know, the average is actually much</p> <p>6 less than that. So even if we did leave a few</p> <p>7 features out, they don't have a lot of residual value.</p> <p>8 Q Now, how did you calculate the \$3.24 number?</p> <p>9 A Well, if we turn now to page 9, and I think</p> <p>10 this sort of indicates again if you take away music</p> <p>11 first, you do get a large number. In this case, out</p> <p>12 of roughly \$12.95, music is worth about \$10.37. And</p> <p>13 if you take it away last, the service has been</p> <p>14 degraded to a point the music now is worth only about</p> <p>15 51 cents. That is not a lot to be taken away later.</p> <p>16 If you now look at an average over all</p> <p>17 respondents of how they answered to each of these</p> <p>18 questions -- now, remember the questions were A</p> <p>19 priority randomized -- then if you average across</p> <p>20 those respondents, you get \$3.24. And that takes into</p> <p>21 account the fact that these features interact.</p> <p>22 Q You mentioned that the second part of your</p>	1611	<p>1 to music that was recorded and released but not</p> <p>2 necessarily composed and written before 1970. And so</p> <p>3 they would allocate a hundred percentage points</p> <p>4 between this. And, of course, there is a quasi-filter</p> <p>5 here if they didn't feel they could answer the</p> <p>6 question, they could check "don't know" or "unsure."</p> <p>7 Q What were the results of this question</p> <p>8 number 9, the parsing question?</p> <p>9 A Well, now, if we turn to page 11, which is</p> <p>10 the summary, again, \$3.24, the average willingness to</p> <p>11 pay for music programming, the answer to the parsing</p> <p>12 question was 65.1 percent averaged across individuals,</p> <p>13 and if you multiply those together you get an estimate</p> <p>14 of \$2.11.</p> <p>15 Q Dr. Hauser, did you do anything to ensure</p> <p>16 that your survey and the methodology was reliable?</p> <p>17 A Yes. I did. I followed as many standard</p> <p>18 scientific methods as feasible. Here's just a few.</p> <p>19 For example, the survey was double-blind; we used</p> <p>20 filters to eliminate respondents who weren't relevant,</p> <p>21 who didn't have an opinion; we used quasi-filters to</p> <p>22 avoid guessing. We were basically following standard</p>

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1612	<p>1 scientific procedures to try and make the survey as 2 reliable and valid as possible. 3 Q Did you use the Internet for your survey I 4 think you mentioned? 5 A Yes. These days the Internet is really 6 widely used for market research. The Internet has 7 some advantages. It avoids interviewer bias, it sort 8 of creates a blind environment. The courts certainly 9 have accepted the results of Internet surveys. 10 Indeed, I testified, I think it was in 11 October in Federal Court, on an Internet survey also 12 with the same panel provider, and there's a lot of 13 other cases where Internet surveys have been accepted. 14 The way this works is there is a panel 15 maintained by companies, large panel companies. In 16 this case we used Research Now, which is a 17 high-quality supplier of respondents. 18 Research Now, for example, maintains an 19 invitation-only panel of over 3.6 million consumers in 20 the U.S. and over 6 million panelists worldwide. They 21 do roughly about 2,000 projects per month for a 22 variety of clients, and these tend to be the blue-chip</p>	1614	<p>1 For example -- 2 CHIEF JUDGE BARNETT: Professor, what was 3 the gender filter? Why was there a gender filter? 4 THE WITNESS: Oh. This is to identify -- 5 it's an issue in the market research industry. There 6 are a small number of people who essentially do this 7 to make money and so they're asked initial question -- 8 the question when they join the panel are they male or 9 female and then we also ask them a question are they 10 male or female. And if those two don't match up -- 11 it's a small number, but we terminate them. 12 CHIEF JUDGE BARNETT: All right. Thank you. 13 THE WITNESS: I'm not sure that's -- but 14 anyhow most of them are screened out if they are not 15 an influential decision-maker or if they can't answer 16 the satellite radio provider. 17 And there's a very small number who are 18 called straight-liners; they give the same answer to 19 everything. And we look at those very carefully and 20 in this case we eliminated a small number. 21 The final sample was 348 respondents. 22 Again, the majority of these were gotten rid of</p>
1613	<p>1 market research companies and consulting firms who 2 are, in turn, working for the top corporations in the 3 world. They have a lot of electronic checks and a lot 4 of human checks to identify fraudulent panels. They 5 do a regular review of member data to validate the 6 identities. Really top corporations use Research Now 7 to make serious decisions about their products and 8 services. 9 I have used it both in litigation and 10 Applied Marketing Science, which I've worked with, has 11 used it in non-litigation as well, used the panel. 12 Q And can you just briefly describe the 13 finding sample of respondents from your survey? 14 A Okay. Yes. Research Now will send out 15 e-mail invitations. People then come to the survey. 16 And in our case 1358 respondents started filling out 17 the survey. A few -- some of these failed to validate 18 on age and gender. Research Now had an age. We had 19 an age. They weren't the same. They failed to 20 validate. Again, a standard procedure. The majority 21 of these were then screened out because they didn't 22 pass the criteria.</p>	1615	<p>1 because they just weren't the respondents we were 2 looking for. 3 JUDGE ROBERTS: Professor Hauser, I wanted 4 to ask you a couple questions about that 348 number. 5 Looking at page 19 of your testimony in paragraph 45, 6 where you identify that number of 348, and you say 7 that this sample size was adequate. 8 Could you describe to us what rating system 9 that you were employing to come up with the use of the 10 word "adequate"? 11 THE WITNESS: Well, as you're aware, there's 12 this issue of a point estimate and then a range about 13 that point estimate. This is what you hear in 14 pollsters, you know, 50 percent plus or minus 2. 15 What we do provide, again in the appendix, 16 is the point estimate plus the range, the confidence 17 interval of that point estimate, and that's a fairly 18 narrow range. So I felt that that narrow range would 19 be adequate. 20 JUDGE ROBERTS: Well, I'm curious about the 21 use of the word "adequate." and that is with respect 22 to the 348. if you varied the numbers and you're</p>

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1616	<p>1 sliding up the scale, what is beyond adequate and what 2 is below adequate? 3 The use of the word to me is just not very 4 precise, that it was adequate. Is it moderately 5 adequate? Is it strongly adequate? Is it so-so 6 adequate? What is it? 7 THE WITNESS: Well, I think if I had ten 8 respondents, I'd say it wasn't adequate and if I had a 9 million respondents, I'd say more than adequate. 348 10 is, in survey research, a very acceptable number. The 11 confidence intervals are tight. It's the type of 12 survey -- well, let me give you an example. 13 There is a methodology in market research 14 called pre-test markets. For example, if Proctor & 15 Gamble is trying to launch a new deodorant or a new 16 laundry detergent, they would show that to consumers 17 ahead of time and then make a forecast, and these 18 forecasts tend to be plus or minus two share points, 19 which is more than enough for Proctor & Gamble to make 20 a decision on launching it. 21 The sample sizes for those surveys tend to 22 be roughly about 300. So it's a number that is really</p>	1618	<p>1 statistical sampling works. 2 If you're drawing from a population, the 3 standard errors -- the ranges of the estimates are 4 dependent upon a number you draw, not the overall 5 population. And this is how, for example, the Nielsen 6 families, they have about a thousand Nielsen families, 7 can be used to get very accurate estimates of, say, TV 8 programming and who's watching what. 9 JUDGE ROBERTS: And I noticed that you 10 conducted the survey over a period of four days last 11 September. 12 THE WITNESS: Yes, that's correct. 13 JUDGE ROBERTS: Okay. Did you make any 14 adjustments to account for the time of year and the 15 possible impact that might have on, say, for instance, 16 music? 17 THE WITNESS: This indeed is a snapshot at 18 the time, and that's why when we compare it to the 19 2007 measures it's amazingly close. So this is -- 20 we're really getting at something that's sort of a 21 valuation of how much they value music, not how much 22 they listen to music at that particular time.</p>
1617	<p>1 quite acceptable. You can get good forecasts. It's a 2 type of number that you would use in a normal course 3 of business. 4 JUDGE ROBERTS: When you're saying that 348 5 is adequate, is that "adequate" relative to the number 6 of people that started to fill out the survey, so it's 7 adequate relative to 1,358 people? 8 THE WITNESS: Well, remember, the 1358 is -- 9 the majority of those are eliminated because they're 10 just not relevant. Okay? 11 The completion rate, once people fill the 12 survey out, is 97 percent. So that's just something 13 that nature deals us. 14 We are trying to find SiriusXM subscribers 15 and that's the way we can find those. So 97 percent 16 completion rate is actually a very high number, and 17 we're very pleased with that. 18 JUDGE ROBERTS: Okay. So actually then the 19 348 you're saying is adequate to the almost 22 million 20 SiriusXM subscribers, not those that actually 21 attempted to fill out the survey? 22 THE WITNESS: Yes, that's indeed how</p>	1619	<p>1 But I agree if we had asked the question 2 "How much music are you listening to," that may or may 3 not have seasonality in it. But I don't think the 4 valuation does have a lot of seasonality. I don't 5 know that for sure, but I do have at least two point 6 estimates that are four years apart and those 7 estimates are quite close. 8 JUDGE ROBERTS: I'm wondering not just with 9 respect to music, your four days of sampling was in 10 September and you, of course, were asking questions 11 about non-music programming. And I myself being a 12 long-time SiriusXM subscriber, at that time of the 13 year one of the most valued programming to me would be 14 the NFL radio so that I can listen to the New York 15 Giants and Pittsburgh Steeler games. But if you 16 conducted the survey, say, in June, well, that really 17 wouldn't be all that valuable to me since there's no 18 NFL games at that time and I should think I might 19 respond differently and value other programming 20 differently. 21 THE WITNESS: That's possible, but when we 22 average over a lot of people, hopefully it works out.</p>

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1620	<p>1 The only thing I can really provide as 2 evidence here is we did do this four years apart, a 3 lot of other things varying, and people made roughly 4 on average the same -- actually very -- very closely 5 on average the same judgments. 6 It also appears that when we were talking to 7 people they felt comfortable with these questions as 8 getting their long-term valuation of music. 9 JUDGE ROBERTS: All right. 10 BY MS. SINGER: 11 Q Dr. Hauser, if you could please take a look 12 at Exhibit H of your testimony, Appendix H. 13 A Yes. 14 Q And this page is entitled "Confidence 15 Interval." Can you tell us what a "confidence 16 interval" is? 17 A Okay. A confidence interval, again, are the 18 ranges you normally hear. 19 What this says is that we have a 95 percent 20 probability -- a 95 percent confidence that the true 21 point estimate is within this range. 22 Now, you've all heard of the bell curve,</p>	1622	<p>1 interval would be really wide, and if I had a million 2 people, the confidence interval would be tight. 3 In this case we can see that the estimate of 4 music varies from 275 to 374 with 324 being pretty 5 much in the middle, but most of the density really is 6 in the middle, our best estimates. 7 Q So what does the 95 percent confidence 8 interval level tell you about your base size? Does 9 that give you any confidence that you had enough 10 people in your sample? 11 A Well, it's in some sense a managerial 12 decision. If you are confident in this confidence 13 interval, knowing most of the density is in the 14 middle, then that would be adequate to make those 15 decisions. Most managers would be comfortable with 16 this level of confidence. 17 Q And now a final question. Now that we have 18 walked through how you got there, can you please tell 19 us what the results of your survey was looking at 20 slide 15? 21 A Okay. Just as a summary, on slide 15, the 22 best estimate of the overall willingness to pay for</p>
1621	<p>1 where it states low and then it peaks. What this says 2 is that most of the -- it's cutting off the ends of 3 the bell curve 2-1/2 percent on either side, so really 4 out in the tails. So it's staying within that range. 5 Again, most of the density is in the middle 6 of that range. But being very conservative, we used 7 the 95 percent confidence interval. 8 JUDGE WISNIEWSKI: And that's under the 9 assumption of a normal distribution? 10 THE WITNESS: Indeed that's under the 11 assumption of a normal distribution, so we're relying 12 on the law as far as numbers. 13 JUDGE WISNIEWSKI: Thank you. 14 BY MS. SINGER: 15 Q And we were talking about the base of 348 16 people. How do you decide what an adequate sample is 17 statistically to make it a statistically significant 18 result? 19 A Well, again, it's actually interesting that 20 any sample you can compute a confidence interval for. 21 So even if I had ten people, I would have a confidence 22 interval. Except if I had ten people, the confidence</p>	1623	<p>1 music, again it's an upper bound estimate, is \$3.24. 2 The best estimate is that 65.1 percent of 3 this is due to music on or before 1970 or beyond and 4 if we multiply those together we get \$2.11. 5 MS. SINGER: I have no further questions. 6 THE WITNESS: Thank you. 7 CHIEF JUDGE BARNETT: Cross-examination? 8 CROSS-EXAMINATION 9 BY MR. HANDZO: 10 Q Good morning, Dr. Hauser. 11 A Good morning. 12 Q I'm David Handzo. And since this is 13 probably the fourth time I have examined you between 14 trials and depositions, I'm sure you will recall that 15 I represent SoundExchange. 16 A Yes, I do. 17 Q Dr. Hauser, in order to have respondents 18 tell you how much they would pay if certain features 19 were removed you needed a starting point, correct? 20 A Yes, I did. 21 Q And you referred to that I guess as the 22 anchor price?</p>

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1624	<p>1 A It is the anchor price. It is parsing the</p> <p>2 market price.</p> <p>3 Q And the anchor price that you used was</p> <p>4 intended to be the price that the consumer was</p> <p>5 actually paying, correct?</p> <p>6 A Yes. My assignment was to parse the market</p> <p>7 price.</p> <p>8 Q Now, I think you may have said on direct</p> <p>9 that you did not include in your survey subscribers</p> <p>10 who were not currently paying; is that right?</p> <p>11 A Yes, that's what I did say.</p> <p>12 Q So you were intending to exclude people who</p> <p>13 had a promotional deal, for example, or a free trial?</p> <p>14 A Yes. I distinguished the two between a</p> <p>15 promotional deal and a free trial, but the people who</p> <p>16 have a free trial were not in the sample.</p> <p>17 Q And the reason I ask is let me ask you to</p> <p>18 take a look at your written testimony, at the survey</p> <p>19 instrument, which I believe is Exhibit D. If you look</p> <p>20 at the main questionnaire starting with question</p> <p>21 one --</p> <p>22 A Just for clarity, there are screen shots and</p>	1626
1625	<p>1 then there's the description. I assume you are</p> <p>2 looking at the description. These are, unfortunately,</p> <p>3 not page numbered.</p> <p>4 Q Yes, I agree it is unfortunate.</p> <p>5 A So something that would say main</p> <p>6 questionnaire pricing section at the top would be Q1.</p> <p>7 Q That is what I'm looking at.</p> <p>8 A Yes.</p> <p>9 Q And I apologize this is cumbersome, but it</p> <p>10 is the 11th page of this exhibit.</p> <p>11 A Yes.</p> <p>12 Q Okay. So that would be the part of the</p> <p>13 questionnaire where you are starting to ask people</p> <p>14 about what they pay, correct?</p> <p>15 A Yes.</p> <p>16 Q And you ask them whether they pay a</p> <p>17 promotional price, correct?</p> <p>18 A Are we looking at Q1 now?</p> <p>19 Q Look at Q3.</p> <p>20 A Okay. Q3. Yes.</p> <p>21 Q So you asked them a series of questions --</p> <p>22 Q3, Q4, Q5, Q6 -- intended to figure out what people</p>	1627
	<p>1 would pay if they're on a promotion and their</p> <p>2 promotion ends, right?</p> <p>3 A Yes, that's correct, and this is for people</p> <p>4 who are actually paying something.</p> <p>5 Q And for those people who were paying less</p> <p>6 than the current standard price because they had a</p> <p>7 promotional deal, you asked them what they would pay</p> <p>8 when their promotion ended; is that correct?</p> <p>9 A Yes, that's correct. There is a small</p> <p>10 number of those.</p> <p>11 Q And for those people you did include them in</p> <p>12 the survey, correct?</p> <p>13 A Yes, I did.</p> <p>14 Q And the anchor price you would have had for</p> <p>15 them was not the price they were actually paying now</p> <p>16 but, rather, the price they said they will pay once</p> <p>17 their promotion ends?</p> <p>18 A Once their promotion ends is the price they</p> <p>19 are willing to pay.</p> <p>20 Remember, some of these people say they will</p> <p>21 not pay -- you know, they will not re-purchase it.</p> <p>22 Q Right, but I just wanted to make it clear</p>	

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1628	<p>1 instituted a price increase, right?</p> <p>2 A I think it was after September.</p> <p>3 Q Yeah. Right. In 2012 there was a price</p> <p>4 increase?</p> <p>5 A Right.</p> <p>6 Q So after the date of your survey?</p> <p>7 A Yes.</p> <p>8 Q So you're aware of that, right?</p> <p>9 A I'll accept that, yes.</p> <p>10 Q Okay. Given that some of these subscribers</p> <p>11 may now be paying more than they were at the time of</p> <p>12 your survey, can we simply increase the values in your</p> <p>13 survey by a proportional amount?</p> <p>14 A That is actually not unreasonable.</p> <p>15 Q Now, in determining that anchor price, I</p> <p>16 think you said on direct that you did not include any</p> <p>17 fees in the price, right?</p> <p>18 A Yeah. This is how consumers thought about</p> <p>19 the price. So being a market researcher, one of the</p> <p>20 things we try and do is phrase the questions in a form</p> <p>21 that consumers understand the questions.</p> <p>22 Q And the way you went about determining this</p>	1630	<p>1 Q And that fee was not included in your anchor</p> <p>2 price, right?</p> <p>3 A That, indeed, is correct.</p> <p>4 Q And, in fact, when you constructed your</p> <p>5 survey you didn't even know what the amount of that</p> <p>6 fee was, did you?</p> <p>7 A If I did know, I've forgotten.</p> <p>8 Q When we look at your number valuing music,</p> <p>9 that is a value that was determined without taking</p> <p>10 into account the fact that subscribers were paying</p> <p>11 \$1.40 or \$1.90 in addition to a music fee, right?</p> <p>12 A This is a number that parses the market</p> <p>13 price they are paying as consumers. They understood</p> <p>14 this price, yes.</p> <p>15 Q So the answer to my question is yes?</p> <p>16 A I made no attempt to measure that additional</p> <p>17 fee, nor did I make an attempt to parse that fee.</p> <p>18 I do know consumers see these as extra fees.</p> <p>19 If you are aware of something called mental</p> <p>20 accounting, where they put things in separate -- the</p> <p>21 consumer tends to put numbers in different,</p> <p>22 essentially, mental accounts, all of those fees tend</p>
1629	<p>1 anchor price, for example, is you would find out what</p> <p>2 package people had, whether it is the basic</p> <p>3 subscription or if it is a premium thing, and you</p> <p>4 would show them what that price is, right?</p> <p>5 A Yes.</p> <p>6 Q And then that was the price that you told</p> <p>7 them to use when they took the rest of the survey,</p> <p>8 right?</p> <p>9 A Well, yes. Actually, basically they tell us</p> <p>10 what they are paying and we then compute that on a</p> <p>11 monthly basis. We didn't want someone who is paying</p> <p>12 for a yearly basis, we didn't want them to have to</p> <p>13 divide by 12. Again, we pre-tested it. They were</p> <p>14 comfortable with the set of questions.</p> <p>15 Q When you computed the price they were</p> <p>16 paying, we agreed you did not include fees, right?</p> <p>17 A Yes. This can be added after the fact, but,</p> <p>18 no, we did not include additional fees, nor did we</p> <p>19 include taxes.</p> <p>20 Q And you know that there is a separate music</p> <p>21 royalty fee imposed by SiriusXM, right?</p> <p>22 A Yes, I'm aware of that.</p>	1631	<p>1 to be fees -- fees and taxes.</p> <p>2 Q As I understand it, the way you conducted</p> <p>3 your survey, the respondents were asked to report what</p> <p>4 they would pay for those SiriusXM services without any</p> <p>5 one of seven features removed in random order?</p> <p>6 A I think that's correctly describing it.</p> <p>7 What we do is we ask willingness to pay before we</p> <p>8 remove a feature. willingness to pay after the</p> <p>9 feature, and we subtract those two numbers.</p> <p>10 Q For some number of respondents in your</p> <p>11 survey they got down to a zero value for the SiriusXM</p> <p>12 service before they were asked about all seven</p> <p>13 features, right?</p> <p>14 A Yes, that is possible.</p> <p>15 Q Are you aware that more than 50 percent of</p> <p>16 the respondents got down to zero before they were even</p> <p>17 asked about the value?</p> <p>18 A That is certainly possible. That would say</p> <p>19 we basically got down to something like FM radio.</p> <p>20 Q Let's put it this way: Are you aware that</p> <p>21 50 percent of the respondents were never even asked</p> <p>22 the value of music?</p>

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1632	<p>1 A That is not actually -- no, I don't think</p> <p>2 that is a fair way of describing the questionnaire.</p> <p>3 Q Let's make sure I understand how you did</p> <p>4 this then.</p> <p>5 Let's say you had a respondent who was asked</p> <p>6 to remove certain features of SiriusXM and they got</p> <p>7 down to a zero value before they were asked to remove</p> <p>8 the current level of music.</p> <p>9 That could happen, right?</p> <p>10 A It certainly happens and it is certainly</p> <p>11 logical. You start taking away commercials -- you</p> <p>12 start adding commercials, you lower the quality, it is</p> <p>13 not available. Everywhere you get rid of some of the</p> <p>14 other features, suddenly they are saying I'm not going</p> <p>15 to pay anything for this. So that's one of the many</p> <p>16 orders that can happen.</p> <p>17 If that happens, now we take away music,</p> <p>18 music is not adding anything because they are already</p> <p>19 paying nothing. So we know the answer, and the answer</p> <p>20 for that particular thing, music is not adding</p> <p>21 anything in that particular order.</p> <p>22 Remember, what we are doing is randomizing</p>	1634	<p>1 sorry -- they would not purchase the service and it is</p> <p>2 no longer any value to them.</p> <p>3 Q And you don't know the percentage of</p> <p>4 respondents who got down to zero before they were</p> <p>5 asked the question, correct?</p> <p>6 A No, I don't.</p> <p>7 Q But for respondents that got down to a zero</p> <p>8 value for the service before they were asked the value</p> <p>9 of music, in your survey results you valued, all of</p> <p>10 those people were shown as valuing music at zero,</p> <p>11 correct?</p> <p>12 A We have taken away all the value. There is</p> <p>13 no value left to parse, so indeed that's the logical</p> <p>14 answer.</p> <p>15 Q Right. And all of those people who were</p> <p>16 valued and gave, according to you, a value of zero to</p> <p>17 music because all the value was gone before they got</p> <p>18 there, they were averaged into the results, correct?</p> <p>19 A As well they should be, yes.</p> <p>20 Q Are you aware that almost 85 percent of</p> <p>21 respondents had no value left for this service once</p> <p>22 you took away music?</p>
1633	<p>1 across all respondents. I think if you like, I have</p> <p>2 an example using automobiles that illustrates this</p> <p>3 point and how it applies to the individual.</p> <p>4 Q That's okay. I heard the automobile example</p> <p>5 before.</p> <p>6 A Right. But I think it's illustrative</p> <p>7 because it applies to the individual and it is central</p> <p>8 here as if we are asking all those questions to a</p> <p>9 respondent. We can't do that because, you know, we</p> <p>10 can't ask essentially seven factorial orders. They</p> <p>11 would rebel.</p> <p>12 So statistically and logically it's as if</p> <p>13 they were rotated across every respondent.</p> <p>14 Q I just want to make sure we understand how</p> <p>15 they worked. Okay?</p> <p>16 A Yes.</p> <p>17 Q So let's go back to square one. Some number</p> <p>18 of respondents would have gotten down to a zero value</p> <p>19 for this service before they were asked how they value</p> <p>20 music, right?</p> <p>21 A That's right. They get to the point where</p> <p>22 they would not purchase the service at any price --</p>	1635	<p>1 A That is certainly possible.</p> <p>2 Q By the way, when the survey was run, there</p> <p>3 was a data file that was prepared that was delivered</p> <p>4 to an outfit called Cornerstone; is that right?</p> <p>5 A Yes, that's correct.</p> <p>6 Q And Cornerstone analyzed the results for</p> <p>7 you?</p> <p>8 A Cornerstone analyzed the results.</p> <p>9 Q And you got the results from Cornerstone?</p> <p>10 A I got the results from Cornerstone.</p> <p>11 Q You did not actually review that data file</p> <p>12 yourself?</p> <p>13 A I did not run the -- I think it was the data</p> <p>14 program. I certainly had a number of checks run. I</p> <p>15 also had Applied Marketing Science check these over.</p> <p>16 You have been provided all these files. If</p> <p>17 there are any errors in the analysis, they would have</p> <p>18 been found by now.</p> <p>19 Q And you didn't review any individual</p> <p>20 respondents, right?</p> <p>21 A Well, I certainly looked over the data in a</p> <p>22 general way, but at my direction both Applied</p>

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1636	<p>1 Marketing Science and Cornerstone reviewed all those 2 respondents.</p> <p>3 Q And you did not review individual 4 respondents, right?</p> <p>5 A I set up the procedures that they followed.</p> <p>6 Q So you did not review individual responses, 7 correct?</p> <p>8 A They followed my procedures very carefully. 9 I did not program the survey. I did not specifically 10 go in and line by line look at these individual 11 respondents.</p> <p>12 Q You didn't look at any of them, did you?</p> <p>13 A I looked at the file in general. I did a 14 logical check on these I'm very confident, and I had 15 multiple people check it. That is what I'm relying 16 on.</p> <p>17 Q I'm sorry. This isn't a trick question. 18 Did you look at any individual respondents yourself?</p> <p>19 A Well, I didn't -- yes and no. I mean I 20 looked over a few, right, just to make sure the data 21 files were correct. After having done that, I then 22 turned that over to the people working at my</p>	1638	<p>1 premium quality dead silence that's available 2 nationwide?</p> <p>3 A Well, remember that, again, this is averaged 4 over all possible orders and some of these people are 5 paying for services that have music, that have comedy, 6 that have sports. So there's going to be some zeroes 7 in there and there's going to be some other numbers.</p> <p>8 Q But I want to make sure I'm understanding 9 what your survey is finding here.</p> <p>10 We can agree, can't we, nobody is going to 11 successfully offer a satellite service and price it at 12 \$1.97 plus \$1.20 if what they are offering is 13 nationwide availability of no content but at a very 14 high quality?</p> <p>15 A Oh, I think we completely agree. These 16 features interact.</p> <p>17 Q So let's turn to the number that you showed 18 for the overall value of current levels of music, 19 which is \$3.24, and actually in the column next to 20 that you show freedom of commercials being valued 21 overall at 2.46, right?</p> <p>22 A Yes.</p>
1637	<p>1 direction. So I did not look at each and every 2 respondent myself.</p> <p>3 Q Dr. Hauser, I think you said on direct that 4 the features that you are assessing through the survey 5 are features that interact with one another, right?</p> <p>6 A Yes, that's correct.</p> <p>7 Q So, for example, if we look at your Appendix 8 G, which I think summarizes your results --</p> <p>9 A Yes.</p> <p>10 Q -- you show values for ubiquity of station 11 availability. The overall is \$1.97, right?</p> <p>12 A Right. If you take it away first, you lose 13 \$7.</p> <p>14 Q And premium sound quality you show an 15 overall value of \$1.20, right?</p> <p>16 A Right, and again you get numbers first, 17 last, and average.</p> <p>18 Q Freedom from commercials you show an overall 19 value of 2.46, right?</p> <p>20 A That's correct.</p> <p>21 Q Now, you would agree with me, would you not, 22 that nobody is going to pay \$1.97 plus \$1.20 for</p>	1639	<p>1 Q Now, you are aware the music channels on 2 SiriusXM are commercial free, right?</p> <p>3 A Yes.</p> <p>4 Q And you are aware SiriusXM has advertising 5 on a number of its non-music channels, correct?</p> <p>6 A Yes, that's correct.</p> <p>7 Q Now, with respect actually to that \$2.46 8 that you show as the value of freedom from 9 commercials, to some extent that value also reflects 10 the value of music, right?</p> <p>11 A Let me just -- could you restate that?</p> <p>12 Q Sure. With respect to the \$2.46 that you 13 show as the value of freedom from commercials, we can 14 agree, can't we, that that number, to some degree, 15 reflects the value of music as well?</p> <p>16 A These features interact just as the value of 17 music reflects freedom from commercials.</p> <p>18 Q So, again, we can agree it wouldn't make any 19 sense to have a positive value for commercial-free 20 dead silence?</p> <p>21 A We can agree that these features fully 22 interact, and this is why the automobile example is</p>

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1640	<p>1 extremely important to understand why this</p> <p>2 randomization over orders is very important when you</p> <p>3 have features that interact.</p> <p>4 Q Now, when you asked respondents in your</p> <p>5 survey to give you a value for current levels of</p> <p>6 music, in some cases respondents were being asked that</p> <p>7 before you asked them to remove a value for freedom</p> <p>8 from commercials, right?</p> <p>9 A That's correct.</p> <p>10 Q So in that case those respondents probably</p> <p>11 would have been thinking about the value of music as</p> <p>12 the value of commercial-free music because you hadn't</p> <p>13 yet removed the commercial-free aspect, right?</p> <p>14 A Well, again, the question is -- it all goes</p> <p>15 back to the tires on the car. Do you want to</p> <p>16 attribute 100 percent of the -- very few people would</p> <p>17 buy a car without tires. Is it fair to attribute</p> <p>18 \$50,000 to tires? No. Because there are a lot of</p> <p>19 things interacting with these tires.</p> <p>20 It's the same thing. What we're trying to</p> <p>21 do is we're trying to get an estimate how we can parse</p> <p>22 it given all the interactions that are going on and</p>	1642	<p>1 respondents would have been asked the value of music</p> <p>2 after they had already removed the commercial-free</p> <p>3 aspect of the service, right?</p> <p>4 A Yes.</p> <p>5 Q So for those respondents, they likely would</p> <p>6 have been giving you a value of music assuming that</p> <p>7 there were commercials, right?</p> <p>8 A Yes. I think if we just give an example,</p> <p>9 suppose we just have those two features and for half</p> <p>10 the people we take away music first and the other half</p> <p>11 of the people we take away commercials first. So we</p> <p>12 start at \$12.95. In both cases we get to \$2.95. So</p> <p>13 the difference is \$10.</p> <p>14 So in one half we take away music first we</p> <p>15 get down to, say, \$3.95. So we take \$9 for music, \$1</p> <p>16 for commercial free. The other half of the people we</p> <p>17 take away commercials first we get down to \$3.95. So</p> <p>18 we have \$9 for commercials, \$1 for music. We are</p> <p>19 getting to the same point no matter which order we</p> <p>20 take those features away. So in that case, because in</p> <p>21 this case there is asymmetry between commercials and</p> <p>22 music, it's fair to attribute half of that to</p>
1641	<p>1 what's very important is that we do the randomization</p> <p>2 over all of these features.</p> <p>3 Q I understand that you want to explain the</p> <p>4 rationale for this, but my question is actually a</p> <p>5 little more limited. I just want to make sure we</p> <p>6 understand what these numbers represent. Okay?</p> <p>7 So if a respondent was asked to provide a</p> <p>8 value for current levels of music and they were asked</p> <p>9 that in a sequence where they hadn't yet been asked to</p> <p>10 remove freedom from commercials from the equation, it</p> <p>11 is reasonable to think that when they gave you a value</p> <p>12 to music they were thinking of it as commercial-free</p> <p>13 music, right?</p> <p>14 A The difference in the willingness to pay was</p> <p>15 dependent upon not having commercials. So indeed that</p> <p>16 whole thing, the whole -- both numbers are added --</p> <p>17 are moved up because there are no commercials.</p> <p>18 You can turn it around the other way and say</p> <p>19 that the fact there are no commercials adds to -- some</p> <p>20 of the value you are getting from music due to the</p> <p>21 fact there is no commercials.</p> <p>22 Q And that's where I was going next. Some</p>	1643	<p>1 commercials and half of that to music.</p> <p>2 So we really shouldn't take any given order</p> <p>3 and try to interpret that. Because we are trying to</p> <p>4 measure the effect of these interactions, we should</p> <p>5 take the randomization over the orders, and that's the</p> <p>6 thing we should interpret.</p> <p>7 Q Let me go with your example. Let's say you</p> <p>8 are only analyzing this for those two attributes,</p> <p>9 commercial free and music.</p> <p>10 A Right.</p> <p>11 Q In the example that you just gave half the</p> <p>12 people are going to be asked to value music with</p> <p>13 commercials and half the people are going to be asked</p> <p>14 to value music without commercials; is that right?</p> <p>15 A Right.</p> <p>16 Q And then in your results you average those</p> <p>17 two responses?</p> <p>18 A That's right. In one case SiriusXM is</p> <p>19 bringing 90 percent of the value, in the other case</p> <p>20 music is bringing 90 percent of the value. So when we</p> <p>21 averaged the 90 and 10, we get 50 percent.</p> <p>22 So I'm trying to say that two things</p>

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1644	<p>1 together, you know, in economic terms, they are</p> <p>2 complements, and because they're complements having</p> <p>3 them together is what's really being valued.</p> <p>4 I know there are some economists on the</p> <p>5 panel. This whole issue -- we are trying to measure</p> <p>6 and parse out the value of complements.</p> <p>7 Q Right. To understand your \$3.24 number</p> <p>8 here, that doesn't represent the value of music</p> <p>9 without commercials, nor does it represent the value</p> <p>10 of music with commercials; it represents something</p> <p>11 in-between, correct?</p> <p>12 A It is an attempt to recognize that we have</p> <p>13 interacting complementary features and we're trying to</p> <p>14 say, you know, who is bringing what to the table. yes.</p> <p>15 Q So if we wanted to know the value of music</p> <p>16 with commercials, we can't just -- let me ask it the</p> <p>17 other way.</p> <p>18 If we want to know the value of commercial-</p> <p>19 free music on SiriusXM, we can't just add the value of</p> <p>20 music and the value of freedom from commercials, can</p> <p>21 we?</p> <p>22 A Again, you know, in the simple case, what we</p>	1646	<p>1 THE WITNESS: -- Wisniewski -- I had a</p> <p>2 student that pronounced it the other way -- Judge</p> <p>3 Wisniewski is correct. it is all seven features that</p> <p>4 interact.</p> <p>5 BY MS. SINGER:</p> <p>6 Q Let me just ask one sort of broader</p> <p>7 question. If we wanted to know the value of music</p> <p>8 delivered on a service that is high sound quality,</p> <p>9 nationwide coverage and no commercials, but doesn't</p> <p>10 have the non-music content, you don't have an opinion</p> <p>11 based on this research what that value would be, do</p> <p>12 you?</p> <p>13 A I think you've misstated my testimony. If</p> <p>14 you want to say we have the service and this service</p> <p>15 is bringing all these other things to the table and</p> <p>16 then we add music on top of that, music only adds 51</p> <p>17 cents.</p> <p>18 On the other hand, if we have all of those</p> <p>19 things and we take music away, well, we'd lose most of</p> <p>20 it. We have gone back and forth on this. It's really</p> <p>21 the interaction and we are trying to parse this</p> <p>22 interaction when we have complementary items.</p>
1645	<p>1 can do is we can say when we add these two together,</p> <p>2 the value of commercials plus the value of music is</p> <p>3 the joint value of commercials plus music. It's a</p> <p>4 joint number.</p> <p>5 So then the question -- that adds up to</p> <p>6 \$5.70 if I've done the math right. We are saying that</p> <p>7 that \$5.70, these two things are bringing that</p> <p>8 together. But in this case music is bringing a little</p> <p>9 bit more than commercial free.</p> <p>10 JUDGE WISNIEWSKI: Well, can you really say</p> <p>11 that, though, Professor Hauser, because you haven't</p> <p>12 differentiated between the first feature, the freedom</p> <p>13 from commercials, as it applies to music and as it</p> <p>14 applies to, for example, the sports program?</p> <p>15 THE WITNESS: You're correct. It's all</p> <p>16 seven together are complements that add to one</p> <p>17 another. So you are right.</p> <p>18 I think I was using it in the example where</p> <p>19 there are only two features. But in this case there</p> <p>20 are all seven features, so -- I hope I pronounce it</p> <p>21 right -- Judge --</p> <p>22 JUDGE WISNIEWSKI: Wisniewski.</p>	1647	<p>1 Q I understand this all interacts and that's</p> <p>2 what makes it complicated, so what I'm trying to get</p> <p>3 at is this:</p> <p>4 If we want to know what's the value of the</p> <p>5 SiriusXM as it currently exists but without non-music</p> <p>6 content, can I figure that out from these results?</p> <p>7 A Let me just repeat what you said so I can</p> <p>8 answer the question.</p> <p>9 Q Sure.</p> <p>10 A So you want to say can I figure out what the</p> <p>11 value of the current SiriusXM radio is without music?</p> <p>12 Q No. Without the non-music content.</p> <p>13 A What?</p> <p>14 Q Without the non-music content.</p> <p>15 A Judge Wisniewski is absolutely right. These</p> <p>16 features interact.</p> <p>17 What we are doing is we are parsing. We are</p> <p>18 parsing. And because we are trying to parse -- let me</p> <p>19 use another example. There is a word known as</p> <p>20 "conjunctive," which means you have to have both.</p> <p>21 In this case you have an extreme value that</p> <p>22 there's no value without them. there's a high value</p>

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1648	<p>1 with them. So if there's a high value with them, all 2 I can really say is that there's a high value with the 3 two features. 4 And what we have here is that we are getting 5 the \$12.95 market price when we have all seven 6 features and if we start taking one away -- I mean, 7 for example, if you take away levels of comedy, you 8 lose \$5, okay, the levels of talk and comedy or levels 9 of sports you're losing \$3.75. 10 If you notice, the first row adds up to a 11 lot more than \$12.95, that is, because they are taken 12 away first. It is different respondents that have 13 taken it away. The row that really matters is when we 14 average over all these possible orders. And so we're 15 really getting at kind of a philosophical issue here, 16 is when you have conjunctive features you really need 17 both of them to make things work or you need all seven 18 things to make things work, how do you try and parse 19 that out, and that's what we are trying to get at. 20 Q And understanding that all of these features 21 are very interrelated and act together, I take it then 22 we cannot sort of mechanistically take the numbers in</p>	1650	<p>1 seven -- well, maybe one more or so. If I had too 2 many features, my respondents would have rebelled, so 3 I was trying to make some difficult decisions here. I 4 subsequently found that I guess some of the comedy 5 recordings are also at issue in this case, and I also 6 understand that Dr. Noll has made some estimates to 7 try to parse that out. But no, I did not parse it out 8 because I was just trying to be parsimonious with the 9 number of features. 10 JUDGE WISNIEWSKI: You didn't want to 11 instigate the spirit of 1776 among your respondent 12 group? 13 THE WITNESS: I'm sorry. What? 14 JUDGE WISNIEWSKI: You didn't want to 15 resurrect the spirit of 1776 among your respondent 16 group? Or perhaps you were more concerned about the 17 spirit of 1783 in France. 18 THE WITNESS: A rebellion. Okay. I thought 19 you were talking about the play 1776 and the sound 20 recordings from that. That is why I was a little 21 confused here for a second. 22 JUDGE WISNIEWSKI: I didn't mean to mislead</p>
1649	<p>1 the overall column and simply say well, if you 2 subtract this factor, then the value of the service is 3 \$12.95 minus that number? 4 A Yes. Mechanistically it's very difficult 5 because they interact. 6 What we can say is that music is bringing 7 \$3.24 of the \$12.95 to the table in essence. 8 Q And when you say music is bringing it, to be 9 clear, we're saying music as it's influenced by being 10 commercial free or not being commercial free, as it's 11 influenced by being delivered with high sound quality 12 or not? 13 A Right. It's how you parse the \$12.95 and 14 it's, of course, all music, both before and after 15 1970, including live and studio recordings, et cetera. 16 MR. HANDZO: If I may just have one moment, 17 I think I'm done. 18 JUDGE WISNIEWSKI: While you're doing that. 19 Mr. Handzo, Professor Hauser, on the talk/comedy 20 category there did you consider parsing that out 21 further as between comedy recordings and other talk? 22 THE WITNESS: Yes. Having more than</p>	1651	<p>1 you. 2 MR. HANDZO: That's all I have. 3 CHIEF JUDGE BARNETT: Mr. Fakler? 4 MR. FAKLER: Nothing from me. 5 MS. SINGER: I have no redirect. 6 CHIEF JUDGE BARNETT: Further questions, 7 Judge? 8 JUDGE WISNIEWSKI: Yes, perhaps one if I 9 may. It might be easiest if I take you to page 10 of 10 your slide package here, and this is also in your 11 testimony as well. This related to question nine. 12 Now, is it fair to say, looking at this 13 question that your survey never asked the respondents 14 to assign a relative monetary value to these 15 characteristics, their listening experience, as it did 16 in question seven? 17 THE WITNESS: That's correct. 18 JUDGE WISNIEWSKI: Thank you. 19 CHIEF JUDGE BARNETT: Any follow-up 20 questions then from counsel? 21 MS. SINGER: No, Your Honor. 22 CHIEF JUDGE BARNETT: May this witness be</p>

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1652	<p>1 excused?</p> <p>2 Thank you, Professor. It's a perfect time</p> <p>3 for us to take a morning recess and we'll do so.</p> <p>4 MR. RICH: Let me state before the recess</p> <p>5 this concludes the case of SiriusXM.</p> <p>6 CHIEF JUDGE BARNETT: Thank you, Mr. Rich.</p> <p>7 JUDGE ROBERTS: I'm sorry, Mr. Fakler, who's</p> <p>8 next?</p> <p>9 MR. FAKLER: Mr. Damon Williams.</p> <p>10 (Brief recess.)</p> <p>11 CHIEF JUDGE BARNETT: Mr. Fakler, you may</p> <p>12 call your witness.</p> <p>13 MR. FAKLER: Thank you, Your Honor. As a</p> <p>14 second witness, Music Choice calls Mr. Damon Williams.</p> <p>15 WHEREUPON,</p> <p>16 DAMON WILLIAMS</p> <p>17 called as a witness, and having been first duly sworn,</p> <p>18 was examined and testified as follows:</p> <p>19 DIRECT EXAMINATION</p> <p>20 BY MR. FAKLER:</p> <p>21 Q Good morning, Mr. Williams. Could you</p> <p>22 please state your name for the record?</p>
1653	<p>1 A Damon Williams.</p> <p>2 CHIEF JUDGE BARNETT: Spell your first name</p> <p>3 for us, please.</p> <p>4 THE WITNESS: D-A-M-O-N.</p> <p>5 CHIEF JUDGE BARNETT: Thank you.</p> <p>6 BY MR. FAKLER:</p> <p>7 Q And, Mr. Williams, where are you presently</p> <p>8 employed?</p> <p>9 A I'm employed at Music Choice.</p> <p>10 Q What position do you hold at Music Choice?</p> <p>11 A I'm currently the Vice President of</p> <p>12 Programming and Content Development.</p> <p>13 Q How long have you held that position at</p> <p>14 Music Choice?</p> <p>15 A I've been with Music Choice for almost 14</p> <p>16 years now.</p> <p>17 (PSS Trial Exhibit Number 3 was</p> <p>18 marked for identification.)</p> <p>19 BY MR. FAKLER:</p> <p>20 Q You have before you a document that has been</p> <p>21 marked for identification as PSS Trial Exhibit 3.</p> <p>22 May I ask you to please take a look at that</p>
1654	<p>1 document and then tell me if you recognize it?</p> <p>2 A Yes, I do.</p> <p>3 Q What is this document?</p> <p>4 A This is my testimony in this case.</p> <p>5 Q And if I ask you to turn to the last page</p> <p>6 before the first tab and look for a signature, is that</p> <p>7 your signature, Mr. Williams?</p> <p>8 A Yes, it is.</p> <p>9 Q And was this testimony true in substance at</p> <p>10 the time that you signed this document?</p> <p>11 A Yes.</p> <p>12 MR. FAKLER: Your Honors, Music Choice would</p> <p>13 like to offer PSS Trial Exhibit 3 into evidence.</p> <p>14 MR. MOSKOWITZ: Good morning, Your Honor.</p> <p>15 SoundExchange has only one limited objection to</p> <p>16 Music Choice Exhibit 28, which is a list of</p> <p>17 testimonials. These apparently are snippets of</p> <p>18 e-mails that Music Choice has received. We had</p> <p>19 requested copies of these e-mails. We received some</p> <p>20 of them for the ones that are actually in the</p> <p>21 testimonial and we don't have any objection to that,</p> <p>22 but we do have an objection to listing other</p>
1655	<p>1 testimonials from documents that we don't have.</p> <p>2 And for those that we have it appears that</p> <p>3 Mr. Williams is not the recipient of the e-mails, we</p> <p>4 have no context for the statements, when they were</p> <p>5 made, to whom they were made, so we think they're</p> <p>6 unreliable.</p> <p>7 JUDGE WISNIEWSKI: Mr. Moskowitz, there are</p> <p>8 quite a few testimonials here, so you'll need to</p> <p>9 identify which ones you say you didn't receive or have</p> <p>10 the documents for or are not directed toward</p> <p>11 Mr. Williams.</p> <p>12 MR. MOSKOWITZ: So the ones that we did</p> <p>13 receive documents for are on the first two pages of</p> <p>14 this and they are almost entirely, in the testimony</p> <p>15 itself, copied on pages four through six, as well as</p> <p>16 another one on page 24. So we have those. Then the</p> <p>17 remaining documents -- the remaining testimonials we</p> <p>18 have no documents for.</p> <p>19 The ones that we did get on pages one and</p> <p>20 two, none of those e-mails were to Mr. Williams, and</p> <p>21 we have no idea what the other ones are, who they were</p> <p>22 made to because we don't have the documents.</p>

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1656	<p>1 CHIEF JUDGE BARNETT: Ms. Singer, any 2 objection? 3 MS. SINGER: No objections. 4 CHIEF JUDGE BARNETT: Mr. Fakler? 5 MR. FAKLER: Thank you, Your Honor. This is 6 obviously a summary document, a summary of a lot of -- 7 and only a mere sampling of many, many, many thousands 8 of testimonials that Music Choice gets over the course 9 of their business. 10 They do not routinely keep these in the 11 course of their business because there are so many of 12 them it's just not something they are required to keep 13 around. The early ones that were being discussed that 14 were produced in discovery were from a very recent 15 vintage leading up to the preparation of the case. 16 The ones after page 2 that are in here are, 17 in fact, from an older time period because, again, 18 Music Choice doesn't keep these. They are from the 19 last proceeding. 20 The e-mails were not produced in this 21 proceeding because of the time limitation on 22 SoundExchange's discovery requests, which were limited</p>	1658	<p>1 produced documents, were retained and we took out 2 three through eight? 3 MR. FAKLER: Well, to the extent three 4 through eight contain actual testimonials that were 5 actually received by Music Choice, I don't immediately 6 see a reason why they should be. I think, of course, 7 the judges are obviously free to give them any weight 8 or lack of weight that they want based on any concerns 9 that are raised on cross-examination or in the 10 examination of Mr. Williams, but I don't believe they 11 should come out of the exhibit. 12 JUDGE ROBERTS: And just to be clear, three 13 through eight are testimonials that are all pre-2007? 14 MR. FAKLER: This begins at the beginning of 15 the bottom of page 3. So with the testimonial that 16 starts, "I can always count," that is the beginning of 17 the range that we're talking about. All the inquiry 18 prior to that were produced in this proceeding. 19 JUDGE ROBERTS: So it's page 1, 2, and 20 really most of page 3, just the bottom portion of 21 page 3 that was not? 22 MR. FAKLER: Yes, Your Honor, and those</p>
1657	<p>1 to recent times, but they were produced in the prior 2 proceeding. 3 Many of these testimonials in the rest of 4 this document were actually highlighted in Mr. Damon's 5 written testimony in the last proceeding. 6 And, again, this is a matter of sort of a 7 summary document of examples of the types of 8 testimonials that they receive. It's not meant to be 9 exhaustive. And with respect to the fact that these 10 recent ones, the e-mails themselves came to other 11 people other than Mr. Williams, they are all people 12 within Mr. Williams' department and he will testify as 13 to how he had this information collected. 14 I don't think -- if Music Choice had to put 15 on every person for every summary of evidence within 16 their business we would have to have a lot more 17 witnesses, and I don't think that is anticipated in 18 this proceeding. But it was certainly at 19 Mr. Williams' request that those e-mails were 20 collected and received. 21 JUDGE ROBERTS: Mr. Fakler, would it be 22 acceptable to you if one or two, for which you have</p>	1659	<p>1 would all be prior to 2007, although there is, 2 again -- 3 JUDGE ROBERTS: And what's their relevance 4 to this proceeding? 5 MR. FAKLER: Well, these are examples of the 6 record labels' and artists' representatives that 7 acknowledge affirmatively the promotional impact of 8 the Music Choice service on the sales of records. 9 And we would submit that certainly, to the 10 extent circumstances have changed between 2007 and 11 now, they certainly haven't changed in any way that 12 lessens the promotional impact. 13 JUDGE ROBERTS: How do we know that? 14 MR. FAKLER: That's one of the things I'm 15 going to be examining Mr. Williams about, are the 16 changes. 17 CHIEF JUDGE BARNETT: Mr. Fakler, I think 18 you can examine Mr. Williams about that without 19 loading on the testimonials that were not produced in 20 discovery. We will eliminate those starting with, "I 21 can always count on Music Choice." page 3 through 22 page 8.</p>

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1660	<p>1 (PSS Trial Exhibit Number 3 2 was received into evidence.) 3 MR. FAKLER: Thank you, Your Honor. And I 4 would also note that prior to trial the protective 5 order was applied to this testimony, but was only very 6 limited with respect to new offerings of Music Choice 7 that have not been offered into the public, so they 8 are highly confidential. There is only one exhibit, 9 Exhibit Number 50, that covers a screen shot of a 10 proposed new service and only a couple of little 11 details within the testimony, so we'll try to talk 12 around the details of those as much as possible. 13 CHIEF JUDGE BARNETT: The onus is on you. 14 MR. FAKLER: Yes, of course, Your Honor. Of 15 course, Your Honor. 16 BY MR. FAKLER: 17 Q Mr. Williams, can you please tell us what 18 your job responsibilities are at Music Choice? 19 A Well, I'm the head of Programming and 20 Content Development at Music Choice. My fundamental 21 job is to create the programming strategy for all of 22 our networks. I also develop our content plans for</p>	1662	<p>1 that I was hired by Radio One to be the Program 2 Director of WKYS here in Washington, D.C. I led that 3 station to the number one rating, or ranking in the 4 Washington, D.C. area in the mid-'90s. 5 After that I actually saw an ad one day for 6 Music Choice, and I applied for Music Choice. At that 7 time the radio industry was really changing, 8 consolidation was coming about. And I was personally 9 looking for some new opportunities, so I decided to 10 join Music Choice. I thought it was an exciting and 11 interesting company. 12 So I went to work for Music Choice in 13 September of 1988. I started there as a Manager of 14 R&B programming. At the time Music Choice had never 15 had an expert in the field of R&B music. They 16 primarily hired me because I had that background, but 17 also because I had a tremendous amount of 18 relationships within the music industry. I had been 19 working with record labels, managers and artists 20 throughout my career, so I was able to bring some of 21 that experience and expertise to Music Choice. At the 22 time Music Choice was not really too ingrained with</p>
1661	<p>1 all of our products, including new consumer 2 experiences that we are going to roll out, some of 3 which we will talk about. 4 Along with that, I also lead the effort on 5 music industry relationships. I work with all the 6 major record labels as well as independent record 7 labels to partner with Music Choice on various ways to 8 promote their artists. 9 Q And when did you first get a job in the 10 music business? 11 A Long time ago. I started in the music 12 business in the mid-'80s. I started out in Norfolk, 13 Virginia, working for a station called K94. I started 14 out in their music department, eventually grew to a 15 management position as music director and on-air 16 personality. 17 From there I worked in a couple other 18 stations in the Norfolk area and eventually got a call 19 to come work in Washington, D.C., here. I was 20 formerly Program Director at WBCT-AM, where I launched 21 one of the first hip hop stations in the country, also 22 a gospel station for that network as well. Soon after</p>	1663	<p>1 the music industry. 2 So from there I was able to really grow that 3 genre for Music Choice, becoming one of our top 4 genres, and I was eventually promoted from manager and 5 received several promotions and more and more 6 responsibility. 7 Eventually I became the Vice-President of 8 Programming for our music channels and as the company 9 expanded its product offerings to include Video on 10 Demand and eventually a linear broadcast network SWRV, 11 I was also put in charge of those entities as well. 12 So at this time I oversee all programming 13 for the company. 14 Q Mr. Williams, when you just discussed 15 consolidation in the radio business at the time that 16 you switched over to Music Choice, can you explain 17 what affect that consolidation had on programming of 18 terrestrial radio? 19 A I think it was a huge affect on programming 20 radio stations. At the time when I was working in 21 radio in the early '90s usually we had three or four 22 stations that might have had the same format in one</p>

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1664	<p>1 marketplace. Those stations might be owned by a 2 bigger corporation, or at that time there was still a 3 lot of mom-and-pop owners, so that meant there were a 4 lot more variety and a lot more choice, a lot more 5 opportunity for music to get played.</p> <p>6 As consolidation came about, these companies 7 began to set up what they called a cluster strategy, 8 where they would hone in on a certain genre or a 9 certain target demographic and literally control that 10 marketplace that would enable them to essentially 11 control the advertising dollars coming from that 12 market.</p> <p>13 That essentially led to much tighter 14 playlists because there was less competition, whether 15 it was for advertising dollars or the attention of 16 parting with record labels or artists, there was less 17 competition, less music getting played. As 18 consolidation began to develop, the actual control and 19 power of a program director lessened.</p> <p>20 When I started out earlier in my radio 21 career as a program director, you were really in 22 charge of the playlists; you knew what was best for</p>	1666	<p>1 A Yes, I did, I interacted with record labels 2 on a very, very consistent basis. Typically once a 3 week I would have regional record reps in my office in 4 there trying to pitch me on what records or priorities 5 they had for that week.</p> <p>6 On a national level I would deal with the 7 vice-presidents and senior vice-presidents on a more 8 strategic basis on things we might be doing with the 9 record company, whether it was putting on a concert 10 event that would include some of their artists or 11 doing some things in the community. But I had 12 constant interaction with record labels at the local 13 level as well as the national level.</p> <p>14 Q Was part of that interaction, did that 15 involve lobbying to get airplay?</p> <p>16 A Yes. Absolutely. Again, typically the way 17 the music industry works, Tuesdays is kind of called 18 add day. That is the day that most new records are 19 added to playlists all across the country. So 20 typically anywhere between a Thursday and late Monday 21 afternoon you are on the phone with a record company. 22 Most times here in D.C., they would actually come to</p>
1665	<p>1 your local market; you ensured that consumers got the 2 best possible consumer experience.</p> <p>3 Well, over time that changed to this cluster 4 strategy where you would have a regional 5 vice-president or a national vice-president that would 6 essentially dictate the playlist in some cases not 7 only for the local station but also for the national 8 station. I kind of saw that as actually being kind of 9 sad.</p> <p>10 One of the things that I enjoyed about 11 working in radio was that it was competitive and it 12 was an opportunity to offer different experiences. So 13 when I came to Music Choice, and one of the reasons I 14 came to Music Choice, I thought it was really 15 interesting to come to a company where it was really 16 about the music and we were trying to create a 17 consumer experience that was about music. And it was 18 just a much different approach than what was happening 19 in radio as consolidation took hold.</p> <p>20 Q Now, when you were working in terrestrial 21 radio in the various positions that you had, did you 22 have interactions with record company employees?</p>	1667	<p>1 the office and then we would begin to work together to 2 try to figure out what would be the right songs to 3 play, what made sense for our station and our 4 audience.</p> <p>5 Q And since the time that you've been working 6 at Music Choice, do you regularly have interaction 7 with record company employees?</p> <p>8 A Yeah, I do now. In my role as 9 vice-president, I work with all the labels at 10 different levels. It was not always that way. When I 11 first started at Music Choice, as I kind of stated 12 earlier in my testimony, when I first came to the 13 company in 1998 there was no interaction with record 14 labels, we were literally still buying CDs or 15 purchasing records from the labels.</p> <p>16 Over time we were able to change that by 17 getting out and strategically creating programs with 18 record labels where they began to see the value in 19 partnering with Music Choice.</p> <p>20 But as of today, I consistently work with 21 record labels. Essentially at least two times a year 22 I do what's called a road show where I actually take</p>

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<p>1 myself and my staff out to record labels to talk about 2 goals and priorities for both organizations throughout 3 the year. So that interaction is very constant and 4 very consistent.</p> <p>5 Q And do record company employees also, as 6 opposed to you going to them, do they contact you in 7 connection with anything?</p> <p>8 A Yeah, absolutely. We have developed that 9 relationship, much like I noted in my radio days, 10 where now it is on a consistent and weekly basis where 11 we consistently hear from promotion reps, marketing 12 reps, product placement, not even just one area of 13 record companies, several different areas of these 14 companies are engaged with Music Choice trying to 15 figure out the best way to gain exposure and leverage 16 our audience.</p> <p>17 Q Now, when you say "we," do you have a staff 18 of programmers that you manage?</p> <p>19 A I have a staff right now of about 65 people 20 which encompasses all the programming that goes on the 21 network, all the content that we develop, whether it's 22 on-screen content, or also original programming that</p>	<p>1 been describing with Music Choice, does Music Choice 2 help sell records?</p> <p>3 A Absolutely. You know, there's a saying in 4 the music industry about moving the needle and that 5 record labels want to partner with people who move the 6 needle. I think my time at Music Choice we have 7 absolutely demonstrated that we can move the needle 8 for record labels especially in the area of newer 9 artists and newer bands who just don't get the 10 opportunity to get exposure right away.</p> <p>11 I think we have earned that and demonstrated 12 that over time through very specific strategic 13 programs and also, again, from just feedback that we 14 have received, whether from a record label, artist or 15 manager directly about how impactful Music Choice is.</p> <p>16 Q And can you describe the type of feedback 17 you get from record companies, artists and their 18 representatives?</p> <p>19 A Yes. I think the feedback comes in a number 20 of different forms. The most common feedback is when 21 labels or artists actually come to our office or talk 22 to us on the phone. So they will call on their weekly</p>
1669	1671
<p>1 we create. We also create our own original 2 programming for our network.</p> <p>3 So it's about 65 people. That is going to 4 grow some towards the end of this year and, you know, 5 by 2017 we will probably be adding another 12 or 15 6 people because we are planning on expanding our 7 programming offering.</p> <p>8 Q And you're referring to the number of audio 9 channels that are going to get expanded?</p> <p>10 A Yes. Right now we have 46 audio channels. 11 Our long-term plan is to go to at least 300 music 12 channels.</p> <p>13 Q And with respect to these programmers that 14 you manage, do they have the same sorts of contacts 15 with record company employees that you described?</p> <p>16 A Yeah, absolutely. The idea is we have 17 experts in each one of their specific genres and in 18 order to be effective you have to work with people 19 that are experts on the record label side, whether 20 it's rock, pop, or country; you have to have people 21 that live that music. So, yes.</p> <p>22 Q Now, based on the experience that you've</p>	<p>1 call and we will talk about the record and they'll say 2 hey, you guys are the only ones in the country playing 3 this particular record and we are seeing some movement 4 in record sales, whether it is on a national basis or 5 in a particular region of the country.</p> <p>6 The second way is artists come in. Just the 7 other day I had an artist who is actually from 8 Washington, D.C., Kenny Latimore, come in the office 9 to do a performance, and he was talking about how 10 Music Choice makes a huge difference for him because 11 he simply is not able to get as many radio stations to 12 program his music.</p> <p>13 We also receive e-mails, as are here in my 14 testimony, as part of the process of them lobbying us 15 for airplay. There's back and forth that happens. So 16 several different ways that it's happened. There is 17 no rhyme or reason being there is one common way, 18 there are several ways. It is just part of the 19 interaction that we have with them.</p> <p>20 Q Now, does Music Choice retain -- when they 21 get e-mails of that nature, does Music Choice keep 22 them around?</p>

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1672	<p>1 A No. I mean I get over a thousand something</p> <p>2 e-mails a day, so I'm usually trying to delete as much</p> <p>3 as possible. So we don't necessarily keep them as a</p> <p>4 matter of practice at all.</p> <p>5 Q But between these phone calls and the</p> <p>6 face-to-face visits and the e-mails, what sort of</p> <p>7 volume are you talking about on a monthly basis?</p> <p>8 A I think it can be hundreds, I mean, because</p> <p>9 we program so many different genres of music. So each</p> <p>10 programming expert in their respective area are</p> <p>11 dealing with people and there's a lot of music out</p> <p>12 there and Music Choice plays a lot of it. So the fact</p> <p>13 that we are exposing a lot of music a lot of these</p> <p>14 people are not getting exposure in other platforms, a</p> <p>15 lot of that feedback and interaction tends to happen</p> <p>16 with us.</p> <p>17 JUDGE ROBERTS: Mr. Williams, do you get</p> <p>18 testimonials or visits from performers from major</p> <p>19 record labels?</p> <p>20 THE WITNESS: Yes, we do.</p> <p>21 JUDGE ROBERTS: Can you give us some recent</p> <p>22 examples of, for instance, performers, well-known</p>
1674	<p>1 or they just came by to promote their recording?</p> <p>2 THE WITNESS: In those instances they were</p> <p>3 coming by to promote their new product, do an</p> <p>4 interview for us for some of our other content</p> <p>5 platforms.</p> <p>6 JUDGE ROBERTS: Can you give us any other</p> <p>7 recent examples?</p> <p>8 THE WITNESS: Those are the two most recent.</p> <p>9 JUDGE ROBERTS: By "most recent" you mean --</p> <p>10 THE WITNESS: Within the last week or two.</p> <p>11 JUDGE WISNIEWSKI: Within the last week or</p> <p>12 two?</p> <p>13 THE WITNESS: Yeah, those are the most</p> <p>14 recent. I don't know how far back you would like me</p> <p>15 to go.</p> <p>16 JUDGE ROBERTS: Well. I'm just thinking the</p> <p>17 April, May time frame.</p> <p>18 THE WITNESS: We did something with Gym</p> <p>19 Class Heroes, recently we did something with Daltrey.</p> <p>20 We actually did a big promotion with Daltrey where he</p> <p>21 came in to promote his new album and his new tour.</p> <p>22 And where a lot of these conversations</p>
1673	<p>1 performers from major labels that have come in to see</p> <p>2 you?</p> <p>3 THE WITNESS: Sure. Just the other week we</p> <p>4 added Nelly Furtado, who is a big Music Choice fan.</p> <p>5 The thing about artists, when they are on</p> <p>6 major or indy labels, a lot of them are Music Choice</p> <p>7 fans, so a lot of them listen to the product in their</p> <p>8 home as well. So particularly when they are in our</p> <p>9 green room they will start to talk about the product</p> <p>10 and they'll start to talk about the impact that it</p> <p>11 has.</p> <p>12 The thing with Music Choice is we typically</p> <p>13 play a song anywhere between four to six weeks prior</p> <p>14 to major radio stations, and that is something that</p> <p>15 the artists and labels pick up on. So a lot of times</p> <p>16 the starting of a record happens in that manner. So</p> <p>17 she is a great example of someone who was in recently.</p> <p>18 Also Eric Benet, who is signed to EMI</p> <p>19 Records, was in the other day, and spoke in the same</p> <p>20 kind of way.</p> <p>21 JUDGE ROBERTS: Now, did they come in</p> <p>22 because they were scheduled to give a live performance</p>
1675	<p>1 always start is that they're big fans of Music Choice</p> <p>2 and that they listen and they appreciate it.</p> <p>3 The thing about Music Choice, in addition to</p> <p>4 playing a lot of songs early, is how we always tend to</p> <p>5 sometimes play songs that may be from the album. So I</p> <p>6 think the additional exposure also has an impact on</p> <p>7 the artist, and a lot of times they might want to have</p> <p>8 conversations with us about what songs they might</p> <p>9 choose as the next hit single.</p> <p>10 So those are two other people I can think of</p> <p>11 within the last six months. again, that were very,</p> <p>12 very, very positive.</p> <p>13 There was another guy named Two Chains, who</p> <p>14 is a rapper on RCA Records. And we really wanted a</p> <p>15 big up and coming guy, so we were actually playing his</p> <p>16 record a little bit before he even got signed to a</p> <p>17 major label. Now he is signed to a major label. and</p> <p>18 he has notated that as well, and that is all within</p> <p>19 the last six months.</p> <p>20 JUDGE ROBERTS: Thank you.</p> <p>21 BY MR. FAKLER:</p> <p>22 Q Mr. Williams, you also mentioned</p>

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1676	<p>1 communications you have with record labels where they 2 are lobbying Music Choice to play their recordings. 3 Do they ever mention, you know, why they're 4 lobbying to get more airplay on Music Choice? 5 A Well, it's our audience. Music Choice has a 6 huge national audience. In a lot of ways it's a 7 one-stop shop for them that they can leverage at one 8 time. 9 If you think about it, there is hundreds and 10 hundreds of radio stations all across the country in 11 50-some-odd markets. For each one of those markets 12 they have to go out and talk to that individual 13 program director or -- and most times they have to 14 talk to the regional VP to try to get a song on, 15 whereas with Music Choice they can come in, they know 16 that our programming philosophy is a lot different and 17 that we're trying to lead the way with new music. So 18 if they're able to get a record on Music Choice's 19 platform, it's an immediate national exposure to a 20 very, very large audience. 21 Q And have they given you any indication as to 22 why they want that national exposure?</p>	1678	<p>1 So I've never had anyone in my entire 2 history at Music Choice ever ask me about anything 3 like that. 4 Q Could the lobbying, the amount to which the 5 lobbying can to some degree control what gets 6 played -- well, first of all, does the lobbying 7 control what gets played? 8 A No, the lobbying doesn't control what gets 9 played, but it's helpful to know what their priorities 10 are. 11 I think the thing is when you support a 12 record, it is nice to know that the record company and 13 the management are all behind that record. So there's 14 a joint effort. You're not on an island all the time 15 playing a record or supporting an artist. 16 Again, our program philosophy is a lot 17 different than terrestrial radio. We're trying to 18 create a consumer experience where the consumer has 19 the ability to discover new music, whether it's new 20 music from a new artist or new music from one of their 21 favorite bands. So our approach is to try to play 22 good records, and that's really our biggest qualifier;</p>
1677	<p>1 A Well, the indication that they give is that 2 they feel like Music Choice can help them move the 3 needle and sell records. I mean that is the bottom 4 line in their business, is that they are trying to 5 figure out ways to sell records, and that has become a 6 more challenging effort for them. I think they are 7 more than happy to have a platform like Music Choice, 8 again, that can deliver a large audience at one time. 9 Q And as far as the record label employees 10 that you deal with and your staff, have they ever 11 given you any indication that the reason they want you 12 to play more of their records is to get a greater 13 royalty from Music Choice? 14 A No, not at all. I don't think most of the 15 people that we deal day to day with, they're not on 16 that side of the business. They don't think of it 17 that way. They're looking at the promotional value. 18 Their job at the end of the day is to move sales. All 19 right? So their job is to sell records. Their job is 20 to, you know, build the artist brand, to make the 21 artist more viable in the marketplace for touring, 22 merchandise, et cetera.</p>	1679	<p>1 is it a good record. 2 Q So as a practical matter, even with all this 3 lobbying, are there limits how far any of these record 4 labels can push the mix of their record label's 5 representation in the totality of Music Choice as 6 compared to other record labels? Can they make a big 7 difference in that ratio? 8 A No, not really. They really can't. It's 9 really our programmers who really decide at the end 10 what content is going to get played on the network. 11 Again, their efforts are about creating 12 awareness and hopefully partnering. 13 Q Now, Mr. Williams, I had asked you to take a 14 look at that Exhibit MC28 that we were discussing 15 before your testimony started, that exhibit with the 16 testimonials. 17 And as we are discussing this, I'm going to 18 ask you to essentially pretend from the bottom of 19 page 3, that last testimonial on the bottom of page 3 20 does not exist. Okay? 21 So can you tell me how Music Choice came to 22 collect these specific testimonials?</p>

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1680	<p>1 A We got these testimonials from my staff. I</p> <p>2 asked my staff to get these testimonials from people</p> <p>3 that we have already gotten feedback from. A lot of</p> <p>4 the people in these testimonials are people that, as a</p> <p>5 matter of practice, had either told us over the phone</p> <p>6 or had sent us something prior. So I asked my staff</p> <p>7 to go out and get them.</p> <p>8 Q So your staff then in these instances</p> <p>9 requested that these folks that they had already</p> <p>10 talked to in the past give them something in writing?</p> <p>11 A Correct.</p> <p>12 Q And as you testified before, Music Choice</p> <p>13 gets all kinds of testimonials similar to these on a</p> <p>14 regular basis that it just doesn't keep, correct?</p> <p>15 A Correct.</p> <p>16 Q Now, the folks who responded and submitted</p> <p>17 these e-mails in this exhibit, were they offered</p> <p>18 anything in response to providing these testimonials?</p> <p>19 A No, not at all.</p> <p>20 Q And do you have any reason, as you sit here</p> <p>21 today, to believe that the sentiments they express in</p> <p>22 these e-mails were not honest?</p>
1681	<p>1 A No. I mean I think these testimonials speak</p> <p>2 for themselves. They are all heartfelt. They're just</p> <p>3 how people feel about the service and what we've been</p> <p>4 able to do for them as a music platform, as a music</p> <p>5 network.</p> <p>6 Q And are these testimonials different like in</p> <p>7 kind, in intensity, or in any way from the ones</p> <p>8 Music Choice routinely gets and discards?</p> <p>9 A No.</p> <p>10 Q And can you think of any reason that these</p> <p>11 particular record company and artist representatives</p> <p>12 would have a reason to want to lie about what they say</p> <p>13 in these e-mails?</p> <p>14 A No, not at all.</p> <p>15 Q Now, how does Music Choice get the sound</p> <p>16 recordings that it programs and plays on its service?</p> <p>17 A Music Choice is currently serviced by all</p> <p>18 the major record labels. We are serviced by indy</p> <p>19 record labels on a routine basis. So on a weekly</p> <p>20 basis we receive tons of CDs.</p> <p>21 Over the last couple years primarily the</p> <p>22 major labels have moved to digital platforms. There</p>
1682	<p>1 is a digital platform called Play MPE where on a</p> <p>2 weekly basis you can go into a website and every</p> <p>3 record that has been released by a record label is</p> <p>4 available in a digital format for you to download for</p> <p>5 airplay on our network. Sometimes it's the single,</p> <p>6 sometimes it's the entire album depending on the</p> <p>7 artist and project.</p> <p>8 We also get record labels who actually walk</p> <p>9 into our offices with the actual CD. Just Friday I</p> <p>10 was at Sony Music for a meeting. They actually handed</p> <p>11 me Usher's new album before anyone in the country. It</p> <p>12 wasn't even at retail. They actually gave me a couple</p> <p>13 copies of it, again, I think with the idea that, you</p> <p>14 know, we would start that record off. So we get fully</p> <p>15 serviced by the labels.</p> <p>16 As I kind of mentioned earlier, it has not</p> <p>17 always been that way for Music Choice. In the past we</p> <p>18 had to go out and purchase records and build our</p> <p>19 playlist that way.</p> <p>20 But, again, I think over the years we've</p> <p>21 kind of earned our wings with the record labels of</p> <p>22 being a network that adds a lot of value in their</p>
1683	<p>1 effort to really boost the product.</p> <p>2 Q Now, Mr. Williams, are you aware of whether</p> <p>3 any record company businesses have an ownership stake</p> <p>4 in Music Choice?</p> <p>5 A Yes. I am.</p> <p>6 Q And which ones do?</p> <p>7 A Sony, Warner, and EMI have an ownership</p> <p>8 stake in Music Choice.</p> <p>9 Q And do you know is this sort of at the</p> <p>10 parent corporate level of these companies, you know,</p> <p>11 that also own recording companies among other --</p> <p>12 A Yes. I mean I would say that it's highly at</p> <p>13 the business level. The people that we deal with on a</p> <p>14 day-to-day basis are really entirely separated and</p> <p>15 divorced from the businesspeople on the ownership</p> <p>16 side.</p> <p>17 Most people that we deal with at record</p> <p>18 labels don't know that. you know, someone works at</p> <p>19 Sony. they don't know that Sony owns a portion of</p> <p>20 Music Choice, they have no idea. And obviously the</p> <p>21 labels don't make that part of their hiring practice,</p> <p>22 to tell people hey, by the way, we own -- because it's</p>

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1684	<p>1 not included.</p> <p>2 Q Do the record companies that have some</p> <p>3 ownership interest in Music Choice, do they treat</p> <p>4 Music Choice any differently from the record companies</p> <p>5 that have no connection to Music Choice?</p> <p>6 A No.</p> <p>7 Q And does Music Choice treat the labels that</p> <p>8 have an ownership interest any differently than they</p> <p>9 treat the labels that don't?</p> <p>10 A Not at all. That is not our practice at</p> <p>11 all. Again, I think for us it goes back to really</p> <p>12 delivering a network and a consumer experience that's</p> <p>13 a lot different than platforms like radio.</p> <p>14 Q Now, with respect to the promotional impact</p> <p>15 that you have been discussing, are there any types of</p> <p>16 recording artists where that promotional effect is</p> <p>17 felt more strongly than others?</p> <p>18 A I mean certainly there are music genres that</p> <p>19 are not available on radio at all these days, whether</p> <p>20 it's jazz or blues. A lot of religious formats are</p> <p>21 just not available on terrestrial radio. So certainly</p> <p>22 those artists feel the impact and welcome</p>	1686	<p>1 contracts because the sales got to a certain point</p> <p>2 where the majors were no longer interested?</p> <p>3 A Correct.</p> <p>4 Q And they're now on independent labels?</p> <p>5 A Yeah, a lot of them have formed their own</p> <p>6 independent labels or have signed to smaller</p> <p>7 independent labels, but they don't necessarily have</p> <p>8 the promotional and marketing resources of the big</p> <p>9 major label behind them.</p> <p>10 Q And are those heritage artists getting</p> <p>11 airplay on terrestrial radio by and large with the new</p> <p>12 product?</p> <p>13 A I mean I'm sure that there may be some</p> <p>14 stations that are playing some of these artists, but I</p> <p>15 don't think it's frequent enough and I don't think</p> <p>16 it's consistent.</p> <p>17 Q So there wouldn't be a heavy rotation?</p> <p>18 A Very unlikely.</p> <p>19 Q And can you explain the notion of heavy</p> <p>20 rotation in terrestrial radio and how that impacts the</p> <p>21 promotional value?</p> <p>22 A Well, heavy rotation describes songs on your</p>
1685	<p>1 Music Choice. Certain types of rock and pop and hip</p> <p>2 hop as well are not available.</p> <p>3 Also, a recent trend I would say in the last</p> <p>4 two or three years, as kind of the record labels have</p> <p>5 consolidated down, has been with heritage artists.</p> <p>6 And heritage artist, I define that as an</p> <p>7 artist that -- a superstar artist signed with major</p> <p>8 labels that are no longer with major labels because</p> <p>9 the economics don't make sense. Some of the artists</p> <p>10 that we work with and play right now that you guys</p> <p>11 might be aware of, people like Bonnie Raitt, Boys II</p> <p>12 Men, Gloria Estefan, Kool and the Gang, all of these</p> <p>13 types of groups that have been in the music business,</p> <p>14 a lot of them for decades, really don't have platforms</p> <p>15 to get their music exposed.</p> <p>16 Bonnie Raitt, for example, has a brand-new</p> <p>17 album out right now that is doing well, and I know we</p> <p>18 were a big part of working with her and her management</p> <p>19 team on playing it on Music Choice.</p> <p>20 Q Now, to be clear, when you are discussing</p> <p>21 these heritage artists, you're talking about artists</p> <p>22 who used to be major label artists who lost their</p>	1687	<p>1 playlist that are offered for airplay typically three</p> <p>2 to four times more than the average record playing</p> <p>3 that week.</p> <p>4 So as consumers are tuning in and tuning out</p> <p>5 of a radio station throughout various parts of the</p> <p>6 day, the heavier the rotation the more likely the</p> <p>7 consumer is to hear that song. So I highly doubt if</p> <p>8 those artists are in heavy rotation and most likely a</p> <p>9 lot of them are not on period.</p> <p>10 Q Now, does airplay on Music Choice promote</p> <p>11 any revenue streams for the record labels or artists</p> <p>12 other than just record sales?</p> <p>13 A I mean there are some strategic things that</p> <p>14 we have done with record labels, whether it's</p> <p>15 something like the week of an album release we have</p> <p>16 worked with artists in the past.</p> <p>17 I know in my testimony there is an example</p> <p>18 with a gospel group, Trini-i-tee 5:7, where their</p> <p>19 manager, who is Matthew Knowles, decided to come to</p> <p>20 Music Choice. He had worked with Music Choice with</p> <p>21 Beyonce actually, and along with working with Beyonce</p> <p>22 we had worked with some smaller acts on his group.</p>

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1688	1690
<p>1 As he decided to get into the gospel 2 business, he knew we had a huge gospel audience and 3 thought it would be a good platform to do something 4 with. So he gave us what is called a grant of right 5 to premier his album a day or two before it actually 6 released to the consumers on iTunes or what-have-you. 7 I know from that promotion they were 8 thrilled. I know that album ended up being the number 9 one gospel album in the country, and they felt really 10 good that we were able to deliver that national 11 audience to them in a very, very targeted way. 12 Q Now, with respect to the grant of rights, 13 you discussed that in your written testimony, so there 14 is no need to go into super detail. But as you just 15 said, this is a scenario where there are certain 16 restrictions on Music Choice's ability to play the 17 recordings even before they are officially released, 18 or a number of cuts off an album, right? 19 A Yes. 20 Q And they give you a waiver so that you -- 21 this is what this grant of rights is, so that you can 22 violate some of those rules with their permission?</p>	<p>1 licensee extra rights and lowered the fee at the same 2 time? 3 A No. 4 Q Now, if the record labels were to do that 5 and just hypothetically say okay, you don't have to 6 pay the royalties for the spins in connection with 7 this promotion, would Music Choice have any way to 8 really calculate that? 9 A No, not at all. 10 Q Does Music Choice pay on a per-spin basis 11 for the sound recording rights? 12 A No. 13 Q And in connection with these custom 14 promotions you've been talking about, I take it these 15 waivers, these grants of rights occur in connection 16 with the customized promotions you discussed in your 17 written testimony? 18 A Yes, they usually typically occur around an 19 album release. I mean there is an example where Brad 20 Paisley, a huge country artist, we worked with him. 21 It's typically trying to create a consumer awareness 22 about a release.</p>
1689	1691
<p>1 A Well, Music Choice has to comply with the 2 DMCA rules. We are only allowed to play a certain 3 amount of songs from the same artist a certain amount 4 of time within a certain time period. 5 When a record label grants us a grant of 6 right, it allows us to, during that grant period, to 7 not have to comply to the DMCA rule. So a grant of 8 right is really empowering us to feature this artist's 9 content on the network, which is supported by our 10 marketing program along with the programming to really 11 have more of a strategic promotion to help the artist 12 and the label. 13 Q And do they charge Music Choice any 14 additional fee to be able to waive those restrictions? 15 A No, not at all. They see it as a tremendous 16 value. 17 Q Do they offer to waive Music Choice's 18 royalty payment? Do they essentially pay Music Choice 19 to do it? 20 A No, not at all. 21 Q Have you ever experienced a scenario in 22 which a record label has voluntarily agreed to give a</p>	<p>1 In the music industry the first week of 2 record sales is typically the biggest week and that's 3 the time you want to try to maximize exposure to your 4 product. So it typically happens along those lines. 5 JUDGE ROBERTS: Mr. Williams, in your 6 experience, do you promote more music, about the same, 7 or less music than SiriusXM does? Do you have any 8 familiarity with that? 9 THE WITNESS: Well, I know that we promote a 10 tremendous amount of music. I'm not totally familiar 11 with Sirius and XM's playlist other than the ones I 12 get in my reporting. I'm not really sure. If you can 13 maybe clarify. 14 JUDGE ROBERTS: What I'm wondering is a lot 15 of the artists that you promote that also come in to 16 see you, are they kind of running a circuit where you 17 would hear, well, I was sitting at the offices of 18 SiriusXM a couple days ago and now I'm doing 19 Music Choice and I will be at Muzak at a later date, 20 or some other service, I'm doing Pandora, I'm doing a 21 lot of different ones. Is that a typical occurrence? 22 THE WITNESS: I'm sure that happens to be</p>

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1692	<p>1 efficient. I'm sure that record labels --</p> <p>2 JUDGE ROBERTS: I am actually asking you in</p> <p>3 your experience is that something you frequently hear</p> <p>4 from artists and record executives that are in contact</p> <p>5 with you, that we're out promoting this and we're</p> <p>6 doing you today and somebody else tomorrow?</p> <p>7 THE WITNESS: Yes, I've heard that before.</p> <p>8 Depending on the artist it can be more frequent or</p> <p>9 less frequent. I think for a lot of the genres that</p> <p>10 we have been talking about -- jazz, blues,</p> <p>11 inspirational, country -- especially in New York --</p> <p>12 those genres don't receive the same type of</p> <p>13 cross-promotion that a pop artist would.</p> <p>14 So does Justin Bieber make the rounds at,</p> <p>15 you know, radio stations, at Sirius, and Music Choice</p> <p>16 all on the same day? That will happen to be efficient</p> <p>17 for the artist's budget. The artist has to actually</p> <p>18 pay for travel, et cetera, for the day. So to be</p> <p>19 efficient they will make the rounds.</p> <p>20 But, again, there is another category of</p> <p>21 music and artists who were not exposed that I know end</p> <p>22 up at Music Choice exclusively.</p>	1694	<p>1 kind of helps establish their brand with consumers.</p> <p>2 So outside of just hearing their music, the consumer</p> <p>3 is offered the opportunity to better understand who</p> <p>4 this artist is.</p> <p>5 In my experience, I think that's been</p> <p>6 particularly helpful for new artists. A lot of times</p> <p>7 a consumer may know the song, they may be able to hum</p> <p>8 a bar or two of the song, but they're not really</p> <p>9 familiar with who the artist is and they want to make</p> <p>10 a purchasing decision.</p> <p>11 Our on-screen interface has really developed</p> <p>12 over the years. When I first started at Music Choice</p> <p>13 in 1998, on some systems like DirecTV, with just a</p> <p>14 black screen with text, you know, it has grown from</p> <p>15 that product to a robust offering of photos, facts and</p> <p>16 images, ad panels to promote their new release, we are</p> <p>17 able to put their artwork on. You know, I would say</p> <p>18 that our consumer experience delivers a much, much</p> <p>19 more robust experience for consumers.</p> <p>20 Q And in a scenario where a subscriber is</p> <p>21 discovering new music by listening to the Music Choice</p> <p>22 channel as compared to discovering new music by</p>
1693	<p>1 JUDGE ROBERTS: Those are the ones that</p> <p>2 don't have a great volume of sales?</p> <p>3 THE WITNESS: Those are the ones that don't</p> <p>4 have as many exposure points, as I talked about</p> <p>5 earlier.</p> <p>6 JUDGE ROBERTS: Okay. Thank you.</p> <p>7 BY MR. FAKLER:</p> <p>8 Q And with respect to -- if I could just</p> <p>9 continue on for a little bit about the distinction</p> <p>10 between Music Choice and Sirius. You're familiar with</p> <p>11 both services?</p> <p>12 A Yes.</p> <p>13 Q And is there any difference between the</p> <p>14 amount of on-screen content with the Music Choice</p> <p>15 audio channels versus what is on the radio with</p> <p>16 SiriusXM?</p> <p>17 A Yes. I think there's a huge difference. I</p> <p>18 think, one, our consumer experience primarily being on</p> <p>19 television offers us the opportunity to do a lot more</p> <p>20 marketing for the artist. So we have, you know,</p> <p>21 artist information, facts about the artist, we have</p> <p>22 photos of the artist and other related content that</p>	1695	<p>1 listening to SiriusXM, for example, in their car, is</p> <p>2 there any difference between how easy it would be for</p> <p>3 that subscriber to write down or remember that new</p> <p>4 information, that new artist's name, that album, that</p> <p>5 promotional information?</p> <p>6 A Yes. Well, you know, obviously consumers --</p> <p>7 I'm pretty confident almost 56 percent of our viewers</p> <p>8 look at the screen at least once per song. So</p> <p>9 obviously in your household you are able to look up at</p> <p>10 and pay attention to the screen. You are not likely</p> <p>11 to do that while you are driving. So I think there is</p> <p>12 more opportunity, along with a more robust product,</p> <p>13 for consumers to see that information.</p> <p>14 Q Does Music Choice's play have any impact</p> <p>15 upon, for example, touring revenues for artists?</p> <p>16 A Yes. In fact, tours are one of the big</p> <p>17 areas of promotion that we work with outside on</p> <p>18 artists. So outside of even promoting their album</p> <p>19 release, we will use the on-screen panels to actually</p> <p>20 promote their tour dates.</p> <p>21 If they're doing a local event in New York,</p> <p>22 sometimes we will send our content team down to their</p>

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1696	<p>1 tour. We do sweepstakes and fly-aways. I talked</p> <p>2 about Daltrey a little bit earlier where we actually</p> <p>3 sent one of our viewers to Los Angeles to see Daltrey</p> <p>4 live in concert.</p> <p>5 So the big thing with selling records and</p> <p>6 selling more tickets, you have to create awareness.</p> <p>7 And the value in Music Choice is that we are helping</p> <p>8 to create this awareness in a very substantial way and</p> <p>9 in a very consistent way and across a lot of different</p> <p>10 genres, and I think that's one of the big differences.</p> <p>11 Q And is the on-screen display a big part of</p> <p>12 that?</p> <p>13 A Absolutely. It is the face of the music.</p> <p>14 Q Has Music Choice done any consumer surveys</p> <p>15 that tend to demonstrate promotions?</p> <p>16 A Yes. I mean we've done studies over the</p> <p>17 course of my time here at Music Choice that show that,</p> <p>18 one, Music Choice consumers tend to over-index on</p> <p>19 things like CD purchases. So if you were to look at</p> <p>20 what the national audiences do in terms of how many</p> <p>21 CDs they buy a month, Music Choice viewers or</p> <p>22 listeners tend to over-index in that area, whether</p>
1697	<p>1 it's CD purchases, purchasing concert tickets, et</p> <p>2 cetera. All of that data has come across pretty</p> <p>3 consistently in all our surveys, that Music Choice</p> <p>4 users are likely to buy product.</p> <p>5 Q So when you say "over-index," can you just</p> <p>6 explain that a little bit, what that means?</p> <p>7 A Well, if the national average is 10 percent</p> <p>8 of U.S. consumers are likely to purchase a CD, a</p> <p>9 Music Choice consumer may be at 15 or 20 percent. So</p> <p>10 we tend to over-index with that. And I would</p> <p>11 attribute that, again, to the product, the consumer</p> <p>12 experience. People are turning on Music Choice to get</p> <p>13 a music experience inside their home. If you're</p> <p>14 likely to discover something that you want to play</p> <p>15 over and over again. I mean Music Choice gives you</p> <p>16 that opportunity to know about that content.</p> <p>17 Q Do the record companies ever advertise the</p> <p>18 fact that Music Choice in particular is playing one of</p> <p>19 their artists?</p> <p>20 A Sure. Yes, we have record labels that see</p> <p>21 Music Choice's service as a valuable advertising</p> <p>22 platform. They will purchase ad panels on our music</p>
1698	<p>1 screen on the appropriate channels.</p> <p>2 We're actually able to -- when their</p> <p>3 artist's song is playing, we're actually able to have</p> <p>4 that banner at the exact same time in sync so that a</p> <p>5 consumer -- it is not a disjointed experience.</p> <p>6 Consumers understand that.</p> <p>7 But, yes, they do.</p> <p>8 Q And I'm trying to get at something a little</p> <p>9 bit different, which is when Music Choice does decide</p> <p>10 to add a track for a particular artist, do the record</p> <p>11 labels ever broadcast that fact? Do you ever</p> <p>12 advertise that Music Choice is featuring a particular</p> <p>13 song?</p> <p>14 A Yes, they do. It is very important and a</p> <p>15 somewhat common practice for the record labels, inside</p> <p>16 industry trades, whether in print or online, to let</p> <p>17 the world know who is playing their music.</p> <p>18 It is very important if Music Choice is</p> <p>19 breaking out and playing the new record by, let's say,</p> <p>20 Gym Class Heroes, which is, you know, a rock band, it</p> <p>21 is very important that they can go to the program</p> <p>22 director of a station in Los Angeles, for example, and</p>
1699	<p>1 say hey, Music Choice has been on this record, they</p> <p>2 have been playing it for two to three weeks, they are</p> <p>3 spinning it this amount of times, they're getting this</p> <p>4 kind of feedback on the record, I really think you</p> <p>5 guys should consider this. And I think that's one of</p> <p>6 the benefits Music Choice affords the record labels,</p> <p>7 that because of our programming philosophy we are more</p> <p>8 than likely to be playing these songs prior to</p> <p>9 terrestrial radio.</p> <p>10 Q Now, just briefly before you were talking</p> <p>11 about some custom promotions that you do at the</p> <p>12 request of the record labels. And you give some</p> <p>13 examples of them in the exhibits and your testimony,</p> <p>14 you know, that's perfectly fine, we don't have to go</p> <p>15 into that sort of level of detail, but with respect to</p> <p>16 those custom promotions, who pays the cost of putting</p> <p>17 together those custom promotions?</p> <p>18 A Music Choice pays the cost. I mean we have</p> <p>19 to develop the on-screen creative; we have to cut the</p> <p>20 promo. So, you know, my staff -- and I talked about</p> <p>21 earlier content, marketing promotion. We have to put</p> <p>22 those things together. If we're doing something like</p>

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1700	<p>1 a sweepstakes campaign, like I talked about with</p> <p>2 Daltrey, someone has to coordinate that. Everyone</p> <p>3 from programming, marketing to legal has to be</p> <p>4 involved to coordinate a promotion and make sure it</p> <p>5 works for everyone.</p> <p>6 Q And has the number of custom promotions that</p> <p>7 Music Choice does, has that increased or decreased</p> <p>8 over time?</p> <p>9 A It's increased over time. It's really</p> <p>10 becoming, you know, a lot more commonplace now more</p> <p>11 than ever, again, because I think there's such a need</p> <p>12 to create a story around an artist.</p> <p>13 Just this week we were given a major</p> <p>14 promotion by a major artist who is Chris Brown. We</p> <p>15 were given a promotion with less than three or four</p> <p>16 days' notice to actually put it on. And we thought it</p> <p>17 was a great promotion for our viewing audience, and we</p> <p>18 actually pulled it off. But more and more record</p> <p>19 labels are turning to us to do that even with bigger</p> <p>20 artists as well as new artists.</p> <p>21 Q Now, in looking back over all the various</p> <p>22 forms of promotion we've been discussing, has the</p>	1702
1701	<p>1 promotional impact of Music Choice changed from the</p> <p>2 time that you started at Music Choice until today?</p> <p>3 A Yes. I think, number one, our distribution</p> <p>4 has grown. So by reaching more people we're able to</p> <p>5 deliver more audience, by expanding our channel</p> <p>6 line-up, over the years we have more formats that we</p> <p>7 are covering. But, again, I think Music Choice has</p> <p>8 built up over time to be a very trusted source. Our</p> <p>9 viewers are very, very loyal. I think they trust our</p> <p>10 expertise. And when we present something, if we say</p> <p>11 this is an album, if we're promoting it, whether it is</p> <p>12 in an integrated promotion or something that we are</p> <p>13 even marketing or a record label buying time, I tend</p> <p>14 to believe our consumers feel it is a solid choice</p> <p>15 coming from us.</p> <p>16 Q Now, does the Music Choice residential music</p> <p>17 service, does it contain original creative content</p> <p>18 that's developed by Music Choice?</p> <p>19 A Sure. We have content that we create on</p> <p>20 screen. We write tons and tons of artist facts,</p> <p>21 trivia, polls, several different categories of content</p> <p>22 that we create to make the listening experience more</p>	1703
	<p>1 artists that don't get exposure, that does not repeat</p> <p>2 the songs so much that you are really tired of.</p> <p>3 So I developed a new programming strategy at</p> <p>4 Music Choice based upon a philosophy of categorizing</p> <p>5 the music much differently than I did in radio, of</p> <p>6 creating strategic positions throughout an hour for</p> <p>7 new music. And with that philosophy I think we were</p> <p>8 able to really create a product that separates itself</p> <p>9 from radio.</p> <p>10 An average radio station may play, you know,</p> <p>11 one of their power songs 70 to 80 times a week.</p> <p>12 That's really repetitive. They already have</p> <p>13 commercials on terrestrial radio, so -- whereas we are</p> <p>14 playing anywhere from 15 to 16 songs an hour, a radio</p> <p>15 station is lucky if they're playing eight or nine.</p> <p>16 So, again, I think our platform is a different</p> <p>17 experience for the consumer.</p> <p>18 Q So this is not an algorithmic approach to</p> <p>19 choosing which songs get played and in what order they</p> <p>20 get played in, right?</p> <p>21 A No, not all. I think that's the problem</p> <p>22 with a lot of the other services. They have turned</p>	

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1704	<p>1 something that people are passionate about, which is</p> <p>2 music, and they've turned it into a computer-generated</p> <p>3 code, and that's not really what music is about.</p> <p>4 I think that's why consumers connect with</p> <p>5 Music Choice. I think that's why we get the direct</p> <p>6 feedback from artists who say they love it, they</p> <p>7 listen to it in their house. I think the platform is</p> <p>8 about the music first, and I think that generates and</p> <p>9 creates the value to help drive sales, tours, et</p> <p>10 cetera.</p> <p>11 Q What other services were you referring to</p> <p>12 when you discussed the --</p> <p>13 A Well, I mean the obvious ones are services</p> <p>14 like Pandora, Slacker, services that are co-dependent</p> <p>15 on a computer algorithm to potentially basically say</p> <p>16 well, if you like this, you're likely to like this,</p> <p>17 and I think it's a very disjointed experience at</p> <p>18 times.</p> <p>19 I think one of the reasons why we have been</p> <p>20 able to maintain our listening is because of the human</p> <p>21 programming experience. Our service still averages,</p> <p>22 you know, 25 hours a week of listening, which is huge.</p>	1706	<p>1 experience.</p> <p>2 Q Is that how webcasters program their</p> <p>3 channels?</p> <p>4 A Not typically. Their channels are, again,</p> <p>5 primarily programmed by an algorithm. Shuffle play</p> <p>6 would be the best way to describe it.</p> <p>7 Q Are you familiar with on-demand or</p> <p>8 interactive webcasting?</p> <p>9 A Yes.</p> <p>10 Q How would you compare a curation like</p> <p>11 Music Choice does to --</p> <p>12 A You know, I think on-demand services are</p> <p>13 simply just making things available, right. It's not</p> <p>14 really curated. It's in some ways a data dump. So,</p> <p>15 you know, here is a list of songs in country, but it's</p> <p>16 not typically put together or certainly not offered in</p> <p>17 a playback structure that would make sense.</p> <p>18 MR. FAKLER: I have no further questions,</p> <p>19 Your Honor.</p> <p>20 CHIEF JUDGE BARNETT: Okay. We will take</p> <p>21 our noon recess. We will reconvene at 1:00.</p> <p>22 (Luncheon recess)</p>
1705	<p>1 MR. FAKLER: Your Honor, I have maybe five</p> <p>2 or six minutes, but I do understand it's noon.</p> <p>3 CHIEF JUDGE BARNETT: I was just going to</p> <p>4 ask. Let's go ahead and finish the direct.</p> <p>5 MR. FAKLER: Thank you.</p> <p>6 BY MR. FAKLER:</p> <p>7 Q Now, Mr. Williams, do you have an</p> <p>8 understanding what the term "curated" means when</p> <p>9 describing a music service?</p> <p>10 A Sure.</p> <p>11 Q Can you please tell us?</p> <p>12 A The word "curated" to Music Choice means</p> <p>13 someone who is a programming expert in a very specific</p> <p>14 area of music actually taking the time to compile a</p> <p>15 list of songs in a way that creates a very, very</p> <p>16 robust experience. I like to think of it as a museum.</p> <p>17 You have a museum curator who's putting</p> <p>18 together an exhibit. He takes his time to get the</p> <p>19 right pieces, the right things on the shelf, so to</p> <p>20 speak, to make sure that you have a consistent</p> <p>21 product. That's what my staff does. We curate every</p> <p>22 channel experience, the music as well as the on-screen</p>	1707	<p>1 AFTERNOON SESSION</p> <p>2 CHIEF JUDGE BARNETT: Mr. Fakler, have you</p> <p>3 completed your direct?</p> <p>4 MR. FAKLER: Yes, sir, Your Honor. Thank</p> <p>5 you.</p> <p>6 CROSS-EXAMINATION</p> <p>7 BY MR. MOSKOWITZ:</p> <p>8 Q My name is David Moskowitz. I represent</p> <p>9 SoundExchange. I have just a few questions to ask</p> <p>10 you.</p> <p>11 If you could take out your written direct</p> <p>12 testimony in front of you, turn to page 4,</p> <p>13 specifically the subheading that says, "Airplays on</p> <p>14 Music Choice Promotes Artists and Sells Records."</p> <p>15 This section is devoted to the promotional</p> <p>16 value of Music Choice, right?</p> <p>17 A Yes.</p> <p>18 Q And you are providing examples to show that</p> <p>19 labels understand the promotional value of</p> <p>20 Music Choice; is that correct?</p> <p>21 A Well, this section is stating -- they're</p> <p>22 stating that Music Choice has value, promotional</p>

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1708	<p>1 value.</p> <p>2 Q And you specifically state there that</p> <p>3 "Record labels and artists frequently give us verbal</p> <p>4 and written testimonials"; is that correct?</p> <p>5 A Yes.</p> <p>6 Q Then you provide a list of two pages roughly</p> <p>7 of testimonials; is that correct?</p> <p>8 A Yes.</p> <p>9 Q On page 5, the second testimonial from Tyson</p> <p>10 Haller of Warner Music Group -- do you see that?</p> <p>11 A Yes.</p> <p>12 Q -- did that testimonial come from an e-mail?</p> <p>13 A Yes.</p> <p>14 Q Do you have in front of you SoundExchange</p> <p>15 Trial Exhibit 59?</p> <p>16 A Yes.</p> <p>17 Q And that's Bates stamped PSS_003228?</p> <p>18 A Correct.</p> <p>19 Q Is this a copy of the e-mail where the</p> <p>20 testimonial came from?</p> <p>21 A Yes.</p> <p>22 MR. MOSKOWITZ: I would like to move this</p>	1710	<p>1 quote on how MC helps the bands you promote? I'd</p> <p>2 really appreciate it."</p> <p>3 Right?</p> <p>4 A Yes.</p> <p>5 Q In other words, Mr. Susalis was requesting a</p> <p>6 testimonial from Mr. Haller, correct?</p> <p>7 A Well, I had asked Gary to get some</p> <p>8 testimonials. Tyson is a person we've been working</p> <p>9 with for years on various artist promotions, et</p> <p>10 cetera, so Tyson is someone that Gary had previously</p> <p>11 talked to or gotten this type of feedback from in the</p> <p>12 past.</p> <p>13 Q Do you see the date on this e-mail is</p> <p>14 November 8, 2011?</p> <p>15 A Yes.</p> <p>16 Q And you filed your written direct testimony</p> <p>17 on November 29, 2011?</p> <p>18 A Yes.</p> <p>19 Q Did you ask Mr. Susalis to get testimonials</p> <p>20 for the purpose of this proceeding?</p> <p>21 A Yes, I did.</p> <p>22 Q Other than for this testimony, for what</p>
1709	<p>1 exhibit into evidence.</p> <p>2 MR. FAKLER: No objections, Your Honor.</p> <p>3 MS. SINGER: No objections.</p> <p>4 CHIEF JUDGE BARNETT: SoundExchange</p> <p>5 Exhibit 59 is admitted.</p> <p>6 (SoundExchange Trial Exhibit Number 59</p> <p>7 was received into evidence.)</p> <p>8 BY MR. MOSKOWITZ:</p> <p>9 Q Who is Gary Susalis? I'm not sure if I'm</p> <p>10 pronouncing the name correctly.</p> <p>11 A Gary Susalis. He is a senior manager of</p> <p>12 music programming. He works for me. He actually</p> <p>13 oversees directly the programming of our music channel</p> <p>14 product.</p> <p>15 Q Do you directly supervise Mr. Susalis?</p> <p>16 A Yes.</p> <p>17 Q If we look at the initial e-mail in the</p> <p>18 chain, do you see the subject of the first e-mail</p> <p>19 chain reads: "Music Choice Survey"?</p> <p>20 A Yes.</p> <p>21 Q The e-mail reads: "Tyson, we are doing a</p> <p>22 survey and I need your help. Can you please give me a</p>	1711	<p>1 purposes have you used the results of this survey?</p> <p>2 A Well, we didn't do a survey. I think Gary</p> <p>3 used the word "survey." I think that's his own</p> <p>4 expression of what I requested him to do.</p> <p>5 What I asked him to do was to get some of</p> <p>6 these testimonials so that we could demonstrate that</p> <p>7 we get this kind of feedback. I think he just chose</p> <p>8 to use the word "survey" as his way of expressing</p> <p>9 himself.</p> <p>10 My point is there's no survey result</p> <p>11 somewhere, a compilation of all these things. There</p> <p>12 is no survey like that.</p> <p>13 Q Do you see there's a bunch of white space</p> <p>14 above this e-mail -- at the top of the e-mail?</p> <p>15 A Yes.</p> <p>16 Q Do you know whether there was text there</p> <p>17 that was removed?</p> <p>18 A No, I don't.</p> <p>19 Q If you turn back to page 5 of your written</p> <p>20 direct testimony and the testimonial from Bram</p> <p>21 Teitelman, was that also solicited through e-mail?</p> <p>22 A Yes.</p>

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1712	<p>1 Q Do you have in front of you SoundExchange 2 Trial Exhibit 60? 3 A Yes. 4 Q And is that Bates stamped PSS_003232? 5 A Yes. 6 Q This is a copy of the e-mail that you used 7 for your testimonial that you put in your written 8 direct testimony? 9 A Yes. 10 MR. MOSKOWITZ: I would move this exhibit 11 into evidence. 12 MR. FAKLER: Your Honor, with respect to 13 this second one that is of an identical nature, this 14 last one, we won't object. 15 MS. SINGER: No objection. 16 CHIEF JUDGE BARNETT: Exhibit 60 is 17 admitted. 18 (SoundExchange Trial Exhibit Number 60 19 was received into evidence.) 20 BY MR. MOSKOWITZ: 21 Q Do you see that e-mail is also dated 22 November 8, 2011?</p>	1714	<p>1 Do you see on page 24 there is another block 2 quote where he says, "The labels appreciate the impact 3 Music Choice has on sales of these kind of artists as 4 shown by this recent testimonial"? 5 A Yes, I just read that. 6 Q And was this testimonial from Mr. Phil Kaso; 7 is that correct? 8 A Yes. 9 Q And was this testimonial also received 10 through the Music Choice survey e-mail? 11 A Well, we didn't have a survey e-mail I think 12 is what I stated. I had Gary go back and talk to some 13 people that had said these things before. 14 Q Was this testimonial -- 15 A It was e-mailed to us. 16 Q -- in response to an e-mail saying that 17 Music Choice is doing a survey and needs Mr. Kaso's 18 help? 19 A I don't have the entire e-mail in front of 20 me, so I can't say that for sure. 21 Q Do you have in front of you SoundExchange 22 Trial Exhibit 61?</p>
1713	<p>1 A Yes. 2 Q Mr. Susalis sent to Bram Teitelman an e-mail 3 identical to the one that he sent to Mr. Haller; is 4 that correct? 5 A Yes, it is identical. 6 Q Do you know whether all the testimonials 7 that are listed on pages four through six of your 8 testimony were solicited for purposes of this trial? 9 A Yes, they were. Most of these, especially 10 some of the newer ones, were. 11 As I stated earlier in my testimony, these 12 were people that initially had already given us this 13 same type of feedback or response, whether it was on a 14 specific record or promotion. Since we don't normally 15 keep these I had Gary double back to people he had 16 talked to to get these. 17 Q Do you know whether Mr. Susalis told 18 Mr. Haller that he was going to use this testimonial 19 in this proceeding? 20 A No, he did not. 21 Q Could you turn to page 24 of your written 22 direct testimony?</p>	1715	<p>1 A Yes. 2 Q And that's Bates stamped PSS_003230? 3 A Yes. 4 Q And is this a copy of the e-mail where you 5 received the testimonial that you cite in your written 6 direct testimony? 7 A Yes. 8 MR. MOSKOWITZ: Your Honor, I would move 9 this into evidence. 10 MR. FAKLER: No objection. 11 MS. SINGER: No objection. 12 CHIEF JUDGE BARNETT: SoundExchange's 13 Exhibit 61 is admitted. 14 (SoundExchange Trial Exhibit Number 61 15 was received into evidence.) 16 BY MR. MOSKOWITZ: 17 Q Do you see based on the initial e-mail from 18 Mr. Susalis to Phil Kaso that he says, "We are doing a 19 survey and I need your help. Can you give me a quote 20 on how MC helps the bands you promote"? 21 A Yes. 22 Q Would you turn back to page 6 of your</p>

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1716	1 written direct testimony? 2 In this section, following the list of 3 testimonials, you discuss various plaques that 4 Music Choice has received from the record industry; is 5 that right? 6 A Correct. 7 Q And you list examples of the plaques on 8 pages six and seven? 9 A Correct. 10 Q Isn't it true that ten of these plaques, 11 beginning on the third plaque on page 7, were taken 12 identically from your testimony in 2006? 13 A I don't have my 2006 testimony, but I'd 14 imagine that is definitely possible. I don't have the 15 exact testimony, but I would imagine it would be. 16 Q Do you have in front of you SoundExchange 17 Trial Exhibit 62? 18 A Yes. 19 Q Do you recognize this document? 20 A Yes, I do. 21 Q What is it? 22 A This is my testimony that I gave from, it
1717	1 looks like, 2006. 2 MR. MOSKOWITZ: Your Honor, I would like to 3 move this into evidence. 4 MR. FAKLER: No objection. 5 JUDGE ROBERTS: Mr. Moskowitz, has anybody 6 designated this testimony already? 7 MR. MOSKOWITZ: I do not believe so. 8 JUDGE ROBERTS: I don't have it. 9 MS. SINGER: I have no objection. 10 CHIEF JUDGE BARNETT: SoundExchange 11 Exhibit 62 is admitted. 12 (SoundExchange Trial Exhibit Number 62 13 was received into evidence.) 14 BY MR. MOSKOWITZ: 15 Q Could you turn to page 5 of your 2006 16 testimony? 17 Do you see that all of these ten plaques 18 appear in order beginning with the third plaque on 19 page 7 of your current written direct testimony? 20 A Yes, starting from Mariah Carey on down. 21 Q So the majority of the plaques that are in 22 your current written direct testimony were received at
1718	1 least five years ago? 2 A I believe there are some newer ones as well. 3 I didn't count. 4 Q You list some additional plaques in Exhibit 5 MC29 to your current written direct testimony; is that 6 correct? 7 A Yes. 8 Q Are you aware of the 33 plaques you identify 9 in MC29 that 22 of those plaques were included as 10 exhibits to your 2006 written direct testimony? 11 A Yes. 12 Q And isn't it also true that of the plaques, 13 if you look closely, many of them appear two or three 14 times because they were sent to multiple individuals 15 at Music Choice; is that correct? 16 A Yes. 17 Q Could you turn to page 5 of your current 18 written direct testimony? 19 A Okay. 20 Q In the second whole paragraph of this page 21 you are discussing your record label partners 22 beginning on the second sentence in that paragraph; is
1719	1 that correct? 2 A I'm not sure where you're at. 3 Q Sure. On the second full paragraph where it 4 says, "Music Choice is extensively surveyed by both 5 major record labels and many of the independents." 6 A Sure. 7 Q And then beginning on the sentence after 8 that you discuss that you treat the partner labels no 9 differently than the non-partner labels, right? 10 A Yes. 11 Q And your current partner labels are EMI and 12 Sony, right? 13 A Yes. 14 Q If EMI and Sony believed that Music Choice 15 provided significant promotional value, wouldn't you 16 expect those labels would seek preferential treatment? 17 A No. As I testified a little earlier, I 18 think it's really two different segments of the 19 business. 20 Most of the people that work in the 21 promotional and marketing areas of the record labels, 22 number one, they're not even privy that we're

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1720	<p>1 partners; they're not necessarily aware that</p> <p>2 Music Choice may be jointly owned or partly owned by</p> <p>3 Sony or EMI. So I haven't had that experience you're</p> <p>4 describing.</p> <p>5 Q So wouldn't you expect if a company thought</p> <p>6 they have a valuable partnership that they would</p> <p>7 instruct their employees that they have this valuable</p> <p>8 partnership and they should use that partnership</p> <p>9 because they are partners?</p> <p>10 MR. FAKLER: Your Honor, I object. It calls</p> <p>11 for speculation. He's not an expert witness in that</p> <p>12 sense. There's no evidence of any of this going on.</p> <p>13 CHIEF JUDGE BARNETT: Sustained.</p> <p>14 BY MR. MOSKOWITZ:</p> <p>15 Q If you could turn to page 10, the bottom</p> <p>16 paragraph beginning with "Music Choice has become a</p> <p>17 proving ground for breaking new artists." Do you see</p> <p>18 that?</p> <p>19 A Yes.</p> <p>20 Q In the second sentence you state that</p> <p>21 "record labels solicit our input when they decide</p> <p>22 whether to sign new artists, particularly artists that</p>	1722	<p>1 decided whether or not they should invest to sign this</p> <p>2 artist and go further with it.</p> <p>3 Q I'm going to ask you to turn to page 11,</p> <p>4 please. At the bottom of page 11 and onto page 12</p> <p>5 you're describing the resources that Music Choice</p> <p>6 brings to sell records; is that correct?</p> <p>7 A Yes.</p> <p>8 Q This section is essentially verbatim from</p> <p>9 your 2006 testimony; is that correct?</p> <p>10 A To say "verbatim," I'd have to go back and</p> <p>11 look at 2006 specifically.</p> <p>12 Q If you could turn to page 7 of your 2006</p> <p>13 written direct testimony, the bottom paragraph of that</p> <p>14 page.</p> <p>15 A Okay.</p> <p>16 Q And these are essentially identical. You</p> <p>17 can take your time to look through it.</p> <p>18 JUDGE WISNIEWSKI: What is essentially</p> <p>19 identical, counsel?</p> <p>20 MR. MOSKOWITZ: I believe it's verbatim</p> <p>21 except for the last --</p> <p>22 JUDGE WISNIEWSKI: What is essentially</p>
1721	<p>1 we are playing," right?</p> <p>2 A Correct.</p> <p>3 Q And you provide an example of Lil Jon,</p> <p>4 right?</p> <p>5 A Correct.</p> <p>6 Q And that example came directly from your</p> <p>7 2006 testimony, right?</p> <p>8 A Yes, it did.</p> <p>9 Q Would you say that most labels solicit</p> <p>10 Music Choice's input before signing a new artist?</p> <p>11 A I would say it's a more common practice by</p> <p>12 genre. I think in the area of hip hop music, where</p> <p>13 those artists are putting out records as independents</p> <p>14 prior to signing to a major and outlets like</p> <p>15 Music Choice are consistently playing that product</p> <p>16 early, what tends to happen, those artists will</p> <p>17 generate some level of regional buzz, and in that case</p> <p>18 we will be asked by reps what do we think of this</p> <p>19 artist, how is this song doing, what is the potential.</p> <p>20 So we are often asked in areas of hip hop, metal, a</p> <p>21 lot of genres where artists have started on the</p> <p>22 independent label and have grown in a major label has</p>	1723	<p>1 identical?</p> <p>2 MR. MOSKOWITZ: Oh, what -- sorry.</p> <p>3 JUDGE WISNIEWSKI: We need to make a record</p> <p>4 here.</p> <p>5 MR. MOSKOWITZ: Sure. The discussion here</p> <p>6 that Music Choice spends a significant amount of</p> <p>7 resources to improve its residential services in ways</p> <p>8 that are specifically designed to sell records, and</p> <p>9 you go on to discuss on-screen displays and --</p> <p>10 JUDGE WISNIEWSKI: Counselor, what are you</p> <p>11 referring to now?</p> <p>12 CHIEF JUDGE BARNETT: What are you reading?</p> <p>13 MR. MOSKOWITZ: This is coming directly from</p> <p>14 the paragraph on page 11 going through page 12 of the</p> <p>15 written direct testimony of Mr. Williams.</p> <p>16 JUDGE WISNIEWSKI: Which one? You're</p> <p>17 referring to two of them. That's why we need to</p> <p>18 distinguish what you're talking about at any point in</p> <p>19 time, sir.</p> <p>20 MR. MOSKOWITZ: Sure. The testimony on page</p> <p>21 11 to 12 is identical to the testimony in the 2006</p> <p>22 written direct testimony on page 7.</p>

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1724	<p>1 MR. FAKLER: Your Honor, I'm going to object</p> <p>2 to the question. It's vague. Now he's claiming it's</p> <p>3 identical.</p> <p>4 If you look at it, it is clearly not</p> <p>5 identical. There is a different exhibit culled out.</p> <p>6 The exhibit in the 2006 testimony, MC13, is not</p> <p>7 attached to the exhibit that they have proffered. And</p> <p>8 on all of those grounds I object to this question.</p> <p>9 CHIEF JUDGE BARNETT: You can cross-examine</p> <p>10 him on that, Mr. Fakler.</p> <p>11 Go ahead. Let's get this question finished</p> <p>12 if we can.</p> <p>13 BY MR. MOSKOWITZ:</p> <p>14 Q So all I was asking is that they're</p> <p>15 essentially identical points that you were making</p> <p>16 almost word for word; is that correct?</p> <p>17 A Again, I'd have to go through it word for</p> <p>18 word to understand, so I'm not going to agree with you</p> <p>19 it is identical. I gave one in 2006 and one recently.</p> <p>20 Q Okay. So the one change, if you look at the</p> <p>21 2006 version, the last two sentences on page 7 of your</p> <p>22 2006 written direct testimony you say, "We also</p>	1726	<p>1 Amazon I think is the one we typically work with.</p> <p>2 Q Could you turn to page 13 of your testimony?</p> <p>3 And beginning there on the second subheading,</p> <p>4 "Music Choice Creates Custom Promotions for Record</p> <p>5 Labels and Artists."</p> <p>6 Do you see that?</p> <p>7 A Yes.</p> <p>8 Q And in this section through page 20 you</p> <p>9 describe what you call custom promotions that</p> <p>10 Music Choice does for certain record labels and</p> <p>11 artists, right?</p> <p>12 A I wouldn't say the word "certain record</p> <p>13 labels." These promotions are open to whatever record</p> <p>14 label would want to work with us. It's not certain</p> <p>15 record labels.</p> <p>16 Q But it's fair to say you have, for the vast</p> <p>17 majority of artists you play on Music Choice, you have</p> <p>18 not done that custom promotion; is that correct?</p> <p>19 A Can you ask that question again?</p> <p>20 Q For well over half of the artists that you</p> <p>21 play on Music Choice you have never done a custom</p> <p>22 promotion for those artists; is that correct?</p>
1725	<p>1 include on some screen displays I noticed that the</p> <p>2 recording being played can be purchased through our</p> <p>3 website, www.musicchoice.com. Over the past eight</p> <p>4 years, over 380,000 CDs have been sold through our</p> <p>5 service with sales totaling over \$4,875,000."</p> <p>6 Do you see that?</p> <p>7 A Yes.</p> <p>8 Q And that is no longer part of your</p> <p>9 testimony, correct?</p> <p>10 A In the newer testimony, yes.</p> <p>11 Q And do you still do that promotion where you</p> <p>12 sell CDs through your website?</p> <p>13 A We have a link to a third-party if consumers</p> <p>14 want to purchase CDs, yes.</p> <p>15 Q But is the on-screen display currently</p> <p>16 available on Music Choice?</p> <p>17 A Yes, the on-screen display is available on</p> <p>18 Music Choice.</p> <p>19 Q It points to what site?</p> <p>20 A Depending on the partner we may be working</p> <p>21 with -- I mean from 2006 to now you had a number of</p> <p>22 people get into the retail business, so it could be --</p>	1727	<p>1 A A certain percentage of the artists we play</p> <p>2 on Music Choice would not have an active album to do a</p> <p>3 promotion. So Pink Floyd, The Wall, for example,</p> <p>4 wouldn't have an active album.</p> <p>5 So, yes, there are a certain percentage of</p> <p>6 artists -- a large percentage of artists who don't</p> <p>7 receive a promotion, but there are a large portion of</p> <p>8 songs that are playing that don't have an active</p> <p>9 promotional campaign. So we think of channels like</p> <p>10 '70s, '80s, Solid Gold, Oldies, that majority of</p> <p>11 artists wouldn't have a campaign. So to answer your</p> <p>12 question, not everyone is even eligible for a</p> <p>13 promotion campaign.</p> <p>14 Q But even those who are eligible -- you play</p> <p>15 a lot of different artists on Music Choice, correct?</p> <p>16 A Correct.</p> <p>17 Q And you don't run custom promotions for most</p> <p>18 of the new artists that are on Music Choice, right?</p> <p>19 A We don't run custom promotions for every</p> <p>20 song or every artist that we play on Music Choice, but</p> <p>21 every song and every artist doesn't have a project</p> <p>22 that would be eligible is the way that I would</p>

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1728	<p>1 describe it.</p> <p>2 Q On page 13, and this is in the first</p> <p>3 paragraph under the heading, one of the types of</p> <p>4 custom promotions you mentioned is running a promotion</p> <p>5 of a band's new album prior to and leading up to the</p> <p>6 official release of the album, right?</p> <p>7 A Which specific one?</p> <p>8 Q Sure. In the third sentence in that first</p> <p>9 paragraph you say, "Custom promotions that we do on</p> <p>10 behalf of the record labels involve heavy promotion of</p> <p>11 a band's new album prior to and leading up to the</p> <p>12 official release of the album."</p> <p>13 A Yes.</p> <p>14 Q And if you turn to page 17, on pages 17</p> <p>15 through 19 you list a few examples of this type of</p> <p>16 promotion, right?</p> <p>17 A Yes.</p> <p>18 Q For example, if you look on page 17, in the</p> <p>19 middle paragraph you discuss a promotion, and I think</p> <p>20 you talked about this earlier, a promotion</p> <p>21 Music Choice did for Brad Paisley?</p> <p>22 A Yes.</p>	1730
1729	<p>1 Q And you say that Music Choice ran this</p> <p>2 promotion at the request of Arista Nashville, right?</p> <p>3 A Yes.</p> <p>4 Q That label is owned by Sony; is that</p> <p>5 correct?</p> <p>6 A Yes.</p> <p>7 Q At the bottom of that paragraph, does MC</p> <p>8 Exhibit 42 contain materials related to that</p> <p>9 promotion.</p> <p>10 A Okay.</p> <p>11 Q Could you turn to Exhibit 42, please?</p> <p>12 A Okay.</p> <p>13 Q Now, earlier you had discussed something you</p> <p>14 called a grant of right, correct?</p> <p>15 A Correct.</p> <p>16 Q And this e-mail on the top is the grant of</p> <p>17 right from Sony; is that correct?</p> <p>18 A Correct.</p> <p>19 Q And if you look at the bottom of that</p> <p>20 e-mail, the first e-mail, it is from Stephanie Cinder</p> <p>21 at Music Choice; is that correct?</p> <p>22 A Yes.</p>	1731

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1732	<p>1 A Correct.</p> <p>2 Q And if you turn to the next page, please,</p> <p>3 the next promotion you list is for the band named</p> <p>4 Disturbed, right?</p> <p>5 A Okay. Yes.</p> <p>6 Q And that promotion was also done in 2005?</p> <p>7 A Yes.</p> <p>8 Q And you included this promotion in your 2006</p> <p>9 written direct testimony; is that correct?</p> <p>10 A Yes.</p> <p>11 Q The promotion below that is for a band</p> <p>12 Shadows Fall, right?</p> <p>13 A Correct.</p> <p>14 Q And that promotion was done in 2004?</p> <p>15 A Yes.</p> <p>16 Q And you included this promotion in your 2006</p> <p>17 written direct testimony?</p> <p>18 A Yes.</p> <p>19 Q Also on page 19 there is a testimonial from</p> <p>20 George Valley of Century Media Records, correct?</p> <p>21 A Yes.</p> <p>22 Q And that testimonial was also included in</p>	1734	<p>1 on screen for the display. A lot of the original</p> <p>2 exclusive content I talked about earlier comes out of</p> <p>3 that process.</p> <p>4 Q But, for example, you had earlier mentioned</p> <p>5 a few artists, Nelly Furtado, Daltrey, Gym Class</p> <p>6 Heroes and Two Chains, right?</p> <p>7 A Yes.</p> <p>8 Q And when those artists visited, did they</p> <p>9 videotape the interviews?</p> <p>10 A Yes, they do videotape. The videotaped</p> <p>11 interview is also an audio interview. Then that</p> <p>12 content is also transcribed for the music channel</p> <p>13 service to use on screen as factoids, et cetera, if an</p> <p>14 artist tells us something. We typically try to find</p> <p>15 something you wouldn't find in a typical file or blog</p> <p>16 or whatever. We describe it as video.</p> <p>17 Q But you don't actually air the interviews on</p> <p>18 the audio channels; is that correct?</p> <p>19 A That is correct. We do have some future</p> <p>20 products that we are releasing that will include that</p> <p>21 content.</p> <p>22 There is some new programming we are going</p>
1733	<p>1 your 2006 written direct testimony?</p> <p>2 A You would have to go back for me to confirm</p> <p>3 that, but I'm sure it is.</p> <p>4 Q And then the final promotion you list is for</p> <p>5 the band God Forbid, right?</p> <p>6 A Yes.</p> <p>7 Q And that promotion was done in 2005?</p> <p>8 A Yes.</p> <p>9 Q And that promotion also appeared in your</p> <p>10 2006 written direct testimony?</p> <p>11 A Yes.</p> <p>12 Q Now, on the bottom of page 20 you discuss</p> <p>13 some other types of custom promotions that you, you</p> <p>14 being Music Choice, do, including artist interviews</p> <p>15 and live recordings, right?</p> <p>16 A Correct.</p> <p>17 Q And most of these promotions primarily</p> <p>18 concern your Video on Demand and SWRV services, right?</p> <p>19 A Well, it could be for a number of</p> <p>20 Music Choice products. It could be for SWRV, VOD, the</p> <p>21 music channels. A lot of times the artist will</p> <p>22 transcribe the artist's interview and use that content</p>	1735	<p>1 to be doing to strengthen our artist platform that</p> <p>2 will actually use those interviews and also conduct</p> <p>3 live interviews on the music channels with artists.</p> <p>4 Q Would you turn to Exhibit 31?</p> <p>5 A Okay.</p> <p>6 Q Is this a list of appearances by artists on</p> <p>7 Music Choice?</p> <p>8 A Yes, it is.</p> <p>9 Q Aren't almost all of these appearances</p> <p>10 related in some part to Video on Demand or SWRV?</p> <p>11 A They are related to all of our platforms.</p> <p>12 We don't look at it as one thing. We look at it as</p> <p>13 someone is coming in to visit our network. All the</p> <p>14 content that we create out of that essentially will</p> <p>15 get used in one format or another across our</p> <p>16 platforms.</p> <p>17 So in these cases, again, information from</p> <p>18 this interview is used on the on-screen display as</p> <p>19 facts and information specific to that artist.</p> <p>20 Q For example, if we looked at the artist One</p> <p>21 Call, there is listed an interview, photos, SWRV</p> <p>22 promo, new rookie smell. What is that?</p>

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1736	<p>1 A New rookie smell is a new artist initiative 2 that we had that would highlight artists that we have 3 curated that we think are going to be the next batch 4 of new artists. 5 What happens on the video side is that 6 there's a piece of content that's created that is 7 available on Video on Demand. On the audio side, when 8 the song is played, we use the on-screen display to 9 call out to consumers that this artist has that new 10 rookie smell and it's a recommendation from 11 Music Choice. 12 As I testified earlier, we, you know, often 13 use that display to add promotion to the music that we 14 are playing and not to create a disjointed experience. 15 That's how we tie together our promotions across the 16 platform, in that there is something you can 17 physically watch on the Video on Demand platform and 18 something you can physically hear on the video 19 platform. 20 Q Would you agree Music Choice benefits when 21 artists come to visit your studios to give interviews 22 and do promos?</p>	1738	<p>1 A I'm not fully understanding what you're 2 trying to ask me. 3 Q Your testimony provides anecdotes about 4 certain promotions that you run, but you didn't -- I'm 5 trying to say you didn't attempt to quantify a value 6 one way or the other as to what promotional value 7 Music Choice has? 8 A Value to who? 9 Q To the artists. To the labels. In any way, 10 shape, or form, you have not done a study to 11 empirically examine this question? 12 A Well, I mean -- 13 MR. FAKLER: Objection to form, vague as to 14 what the question is. 15 CHIEF JUDGE BARNETT: Sustained. 16 BY MR. MOSKOWITZ: 17 Q Mr. Williams, there is no empirical study in 18 your testimony; is that correct? 19 MR. FAKLER: Objection, Your Honor. That is 20 a mischaracterization. There are several studies 21 attached to his testimony. To say there are no 22 empirical studies in his testimony --</p>
1737	<p>1 A Sure, I think our fans benefit from being 2 able to somehow access artist content, so I think that 3 enhances our experience and creates a connection with 4 our fans. 5 Q Does it help build a better brand for 6 Music Choice? 7 A Sure. I think any association directly with 8 the artist that consumers are passionate about would 9 obviously be helpful to our service. 10 Q Do you believe that your video services, 11 Video on Demand and SWRV services, are very 12 promotional for artists? 13 A Absolutely. 14 Q Mr. Williams, would you agree that your 15 testimony does not contain any empirical evidence 16 quantifying the overall promotional or substitutional 17 value of Music Choice and its audio channels? 18 A Would you mind explaining that a little more 19 in layman's terms, please? 20 Q You don't attempt to qualify the overall 21 promotional or substitutional value of Music Choice's 22 audio channels in your testimony; is that correct?</p>	1739	<p>1 JUDGE WISNIEWSKI: Are you answering, 2 Mr. Fakler? 3 MR. FAKLER: I'm sorry, Your Honor, but that 4 was just a mischaracterization. 5 CHIEF JUDGE BARNETT: Where are the 6 empirical studies you reference, Mr. Fakler? 7 MR. FAKLER: If you look at MC Exhibits 34, 8 35, 36, 37, 38, each one of those is an empirical 9 study. 10 CHIEF JUDGE BARNETT: Thank you. 11 MR. MOSKOWITZ: I understand that 12 Music Choice has conducted surveys. My question was 13 simply whether Mr. Williams has done an empirical 14 analysis overall as to the promotional value of music. 15 I wasn't planning on asking a complicated question 16 here. I'm trying to confirm -- he has attached some 17 surveys. If he hasn't done any analysis on that, 18 that's fine. I'm not trying to -- 19 CHIEF JUDGE BARNETT: Overruled. You can 20 answer the question if you can answer the question. 21 THE WITNESS: Can you restate the question? 22 BY MR. MOSKOWITZ:</p>

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1740	<p>1 Q Sure. In your testimony you do not attempt</p> <p>2 to empirically analyze the overall promotional value</p> <p>3 of Music Choice's audio channels to artists and</p> <p>4 labels; is that correct?</p> <p>5 A In my testimony, I believe what you are</p> <p>6 asking, there's not a specific study. But, as a</p> <p>7 matter of practice, when we work with a record label</p> <p>8 or an artist, I'll typically do what is called a post</p> <p>9 report. A post report will give you an overview of</p> <p>10 the usage and other factors related to the promotion.</p> <p>11 I don't know if that helps to answer your</p> <p>12 question.</p> <p>13 Q Also, in your testimony you haven't done an</p> <p>14 empirical analysis comparing Music Choice to other</p> <p>15 music services like Pandora or Spotify; is that</p> <p>16 correct?</p> <p>17 A Well, there is data in these studies that do</p> <p>18 compare us to each of those organizations.</p> <p>19 Q There is stuff in the surveys but nothing in</p> <p>20 your written direct testimony; is that correct?</p> <p>21 A Not that I know of.</p> <p>22 MR. MOSKOWITZ: No further questions, Your</p>	1742	<p>1 of right where Music Choice was requesting</p> <p>2 confirmation of a grant of right.</p> <p>3 Did Music Choice ask to do that promotion or</p> <p>4 did Sony ask Music Choice?</p> <p>5 A Sony asked Music Choice.</p> <p>6 Q And, finally, when you talked about the</p> <p>7 artists coming in to do the appearances and the</p> <p>8 content that created that's used on Video on Demand</p> <p>9 and SWRV, do some of those recordings include not just</p> <p>10 interviews but actual performances by the band?</p> <p>11 A Yes. Some of the artists that come in will</p> <p>12 do performance versions of their songs. We take those</p> <p>13 versions and we make them available on the music</p> <p>14 channel service sort of as an exclusive version.</p> <p>15 Q So in addition to content for the video part</p> <p>16 of the service, it's also played on the audio channel,</p> <p>17 right?</p> <p>18 A Yes.</p> <p>19 Q And in your view, as Director of Programming</p> <p>20 and Content, is the video part of the service and the</p> <p>21 audio channel part of the service separate things?</p> <p>22 A No, not at all. They all work together. We</p>
1741	<p>1 Honor.</p> <p>2 CHIEF JUDGE BARNETT: Thank you.</p> <p>3 MR. FAKLER: Just a very brief redirect,</p> <p>4 Your Honor.</p> <p>5 REDIRECT EXAMINATION</p> <p>6 BY MR. FAKLER:</p> <p>7 Q Mr. Williams, if you would take a look</p> <p>8 briefly at what was marked as SoundExchange Trial</p> <p>9 Exhibit 59, one of the first of those e-mails.</p> <p>10 A Okay.</p> <p>11 Q And you were asked about the blank space at</p> <p>12 the top of the e-mail.</p> <p>13 I would just like to proffer for the court,</p> <p>14 because this is just an artifact of the document</p> <p>15 production, this was just a redaction of</p> <p>16 correspondence from inside counsel to outside counsel</p> <p>17 in the e-mail that Mr. Williams would have no way of</p> <p>18 knowing about.</p> <p>19 The second matter, you recall being asked</p> <p>20 about the Brad Paisley promotion with Sony?</p> <p>21 A Yes.</p> <p>22 Q And you reviewed an e-mail about the grant</p>	1743	<p>1 cross-promote an artist across both platforms. I</p> <p>2 think together we give a more powerful opportunity to</p> <p>3 help artists and labels.</p> <p>4 MR. FAKLER: Thank you. That's all I have.</p> <p>5 JUDGE WISNIEWSKI: Just one quick question,</p> <p>6 Mr. Williams.</p> <p>7 In your direct testimony you had indicated</p> <p>8 that Music Choice pays the cost of these custom</p> <p>9 promotions.</p> <p>10 Do you remember that?</p> <p>11 THE WITNESS: Yes, sir.</p> <p>12 JUDGE WISNIEWSKI: Why is that?</p> <p>13 THE WITNESS: Well, it's a matter of doing</p> <p>14 business. I mean a lot of the costs associated with</p> <p>15 these promotions are internal to us. And someone has</p> <p>16 to create the advertising panel, so we have a creative</p> <p>17 graphics team that creates those things.</p> <p>18 So most of the costs that are associated</p> <p>19 with these promotions are related to us putting the</p> <p>20 marketing up on our product line. In the case of</p> <p>21 video, we have to actually produce a video commercial.</p> <p>22 So those costs are all (inaudible).</p>

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1744	<p>1 JUDGE WISNIEWSKI: Well, why do you spend</p> <p>2 money that way I guess is the question?</p> <p>3 THE WITNESS: Well, we spend money that way</p> <p>4 because, again, I think it's making -- confirming to</p> <p>5 consumers that when they come to Music Choice's</p> <p>6 platform they are going to get an experience that is</p> <p>7 different than others.</p> <p>8 We are trying to have a unique business</p> <p>9 opportunity for artists and give people a reason to</p> <p>10 want to work with us. I think you have to do things</p> <p>11 that give people a reason to do that.</p> <p>12 JUDGE WISNIEWSKI: You're saying it is to</p> <p>13 your benefit that you are able to differentiate</p> <p>14 yourself that way?</p> <p>15 THE WITNESS: Well, what I'm saying is that</p> <p>16 I think it is a benefit to everyone involved, and I</p> <p>17 see that as being Music Choice, the artists, labels</p> <p>18 and consumers. I think it is a mutual benefit.</p> <p>19 JUDGE WISNIEWSKI: Thank you.</p> <p>20 CHIEF JUDGE BARNETT: Any further questions?</p> <p>21 MR. FAKLER: No, Your Honor.</p> <p>22 MS. SINGER: No, Your Honor.</p>
1745	<p>1 MR. MOSKOWITZ: No, Your Honor.</p> <p>2 CHIEF JUDGE BARNETT: May this witness be</p> <p>3 excused?</p> <p>4 MR. FAKLER: Yes, Your Honor.</p> <p>5 CHIEF JUDGE BARNETT: Thank you,</p> <p>6 Mr. Williams.</p> <p>7 MR. FAKLER: Your Honor, Music Choice calls</p> <p>8 Dr. Gregory Crawford.</p> <p>9 CHIEF JUDGE BARNETT: Counsel, do you know</p> <p>10 how long this examination is going to take?</p> <p>11 MR. CUNNIFF: I'm hoping less than two</p> <p>12 hours.</p> <p>13 CHIEF JUDGE BARNETT: Because we didn't</p> <p>14 break early yesterday. I need to today. We will see</p> <p>15 how it goes. Mr. Cuniff?</p> <p>16 MR. CUNNIFF: Yes. Dr. Crawford has a</p> <p>17 flight to the U.K., but has told me he can move the</p> <p>18 flight and be here tomorrow. I think we only get one</p> <p>19 indulgence.</p> <p>20 JUDGE WISNIEWSKI: If you go on for two</p> <p>21 hours, that would leave no time for any</p> <p>22 cross-examination. Unless someone decides not to make</p>
1746	<p>1 any cross-examination, he can count on being here</p> <p>2 tomorrow.</p> <p>3 MR. CUNNIFF: Well, perhaps I will be so</p> <p>4 brilliant, cross-examination can be foregone.</p> <p>5 CHIEF JUDGE BARNETT: Perhaps once more I'll</p> <p>6 grant the indulgence.</p> <p>7 WHEREUPON,</p> <p>8 GREGORY CRAWFORD, PH.D.</p> <p>9 called as a witness, and having been first duly sworn,</p> <p>10 was examined and testified as follows:</p> <p>11 DIRECT EXAMINATION</p> <p>12 BY MR. CUNNIFF:</p> <p>13 Q If it please the Court, my name is Martin</p> <p>14 Cuniff. I represent Music Choice.</p> <p>15 Good afternoon, Dr. Crawford. Please state</p> <p>16 your name and spell it for the record, please.</p> <p>17 A Sure, I'd be happy to. My name is Gregory</p> <p>18 S. Crawford. G-R-E-G-O-R-Y, S as in Sam, last name</p> <p>19 Crawford, C-R-A-W-F-O-R-D.</p> <p>20 Q Dr. Crawford, what is your profession?</p> <p>21 A I'm a professor of economics.</p> <p>22 Q And do you have a specialty?</p>
1747	<p>1 A I do. I have a number of specialties. My</p> <p>2 primary specialty is the study of what is called in</p> <p>3 the United States industrial organization, what is</p> <p>4 called in Europe industrial economics, but they are</p> <p>5 the same thing. And industrial organization is really</p> <p>6 the understanding of markets, what are the elements of</p> <p>7 demand in markets, what are the elements of cost, what</p> <p>8 are the elements of competition, and how those things</p> <p>9 interact to determine outcomes in markets.</p> <p>10 In those outcomes -- if there are issues</p> <p>11 with the outcomes, for example, if there are market</p> <p>12 failures, it also considers what policymakers might do</p> <p>13 to mitigate or eliminate those market failures.</p> <p>14 Q And where are you currently employed?</p> <p>15 A I'm employed as a Professor of Economics at</p> <p>16 the University of Warwick. I'll spell that. It's</p> <p>17 W-A-R-W-I-C-K. The second "W" is silent.</p> <p>18 Q And where is that?</p> <p>19 A That is in Coventry, roughly right in the</p> <p>20 middle of England.</p> <p>21 Q And what do you teach there?</p> <p>22 A At the moment I teach two courses. I teach</p>

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1748	<p>1 a course in econometrics to undergraduates and then I</p> <p>2 teach a course to a mixture of Master's and Ph.D.</p> <p>3 students on empirical method.</p> <p>4 Q And over the course of your career what</p> <p>5 other courses have you taught?</p> <p>6 A I have taught a large number of different</p> <p>7 courses. I have also taught introductory</p> <p>8 microeconomics to freshmen. That was interesting. I</p> <p>9 have taught business strategy both to undergraduate</p> <p>10 students and to MBA students; I have taught Ph.D.</p> <p>11 level courses in my specialty, industrial</p> <p>12 organization; I taught a Ph.D. course in econometrics;</p> <p>13 and I've even taught a course on the economic and</p> <p>14 statistics of sports.</p> <p>15 Q How long have you been a professor at the</p> <p>16 University of Warwick?</p> <p>17 A I'm in my fourth year.</p> <p>18 Q And have you taught at other universities?</p> <p>19 A I have.</p> <p>20 Q And where else have you taught?</p> <p>21 A My first position was at Duke University in</p> <p>22 Durham, North Carolina, and then after working at Duke</p>	1750	<p>1 I also advised on the proposed SiriusXM</p> <p>2 merger, which was in front of the Commission at that</p> <p>3 time, and then I had a hand in a large number of</p> <p>4 smaller matters.</p> <p>5 Q I understand you've been invited to be a</p> <p>6 Research Fellow at the Center for Economic and Policy</p> <p>7 Research, so what can you tell us about the Center?</p> <p>8 A So the Center for Economic and Policy</p> <p>9 Research is a research organization in Europe. It</p> <p>10 largely does two things: It helps attract and then</p> <p>11 administer research projects. Largely that means</p> <p>12 getting grant funding among the professors that are</p> <p>13 fellows of the Center for Economic and Policy</p> <p>14 Research. Another thing being done is it is a primary</p> <p>15 vehicle for disseminating research through a working</p> <p>16 paper series.</p> <p>17 Q And, Dr. Crawford, what do you consider your</p> <p>18 area of expertise?</p> <p>19 A Well, I think, as I mentioned earlier, I</p> <p>20 think my primary area of expertise is industrial</p> <p>21 organization, but I also have interest and expertise</p> <p>22 in law and economics, particularly where it overlaps</p>
1749	<p>1 for six years I moved to the University of Arizona in</p> <p>2 Tucson. And then after a one-year position in the</p> <p>3 government, I moved to the University of Warwick.</p> <p>4 Q And what is your educational background?</p> <p>5 A I have a Bachelor of Arts in Economics from</p> <p>6 the University of Pennsylvania and a Ph.D. in</p> <p>7 Economics from Stanford University.</p> <p>8 Q Have you worked in the government as an</p> <p>9 economist?</p> <p>10 A I did.</p> <p>11 Q In what role?</p> <p>12 A In 2007/2008 I worked as the Chief Economist</p> <p>13 for the Federal Communications Division.</p> <p>14 Q And what did you do as the Chief Economist</p> <p>15 at the FCC?</p> <p>16 A Well, the Chief Economist at the FCC is</p> <p>17 primarily the Chairman's Chief Economist, so I</p> <p>18 reported to the Chairman of the FCC and advised him on</p> <p>19 matters facing the Commission at that time.</p> <p>20 For the year that I was there I largely</p> <p>21 worked on issues in the cable and satellite industry.</p> <p>22 and that reflects my background and expertise.</p>	1751	<p>1 with industrial organization and the economics of</p> <p>2 regulation, as well as econometrics, which is, of</p> <p>3 course, the application of statistical methods to an</p> <p>4 economic problem.</p> <p>5 Q And have you conducted research in those</p> <p>6 fields?</p> <p>7 A Yes, I have conducted research in some</p> <p>8 combination of those fields for over 20 years.</p> <p>9 Q And have you also published articles in</p> <p>10 those fields?</p> <p>11 A I have.</p> <p>12 Q Can you give us just a few examples?</p> <p>13 A Yeah, sure. So I have published perhaps ten</p> <p>14 or a dozen articles. Some of them have been in</p> <p>15 journals that are widely considered to be among the</p> <p>16 best in economics. So, for example, I have articles</p> <p>17 in Econometrica and the American Economic Review,</p> <p>18 which are believed to be two of the top five academic</p> <p>19 publications in economics.</p> <p>20 I've also published articles in the Rand</p> <p>21 Journal of Economics, which is the top field journal</p> <p>22 for my specialty, industrial organization, as well as</p>

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1752	<p>1 the Journal of Law and Economics, which is considered</p> <p>2 by some to be the best field journal on law economics.</p> <p>3 And I think I mentioned earlier that I have</p> <p>4 quite a bit of specialty in the cable and the</p> <p>5 satellite industries. So the National Bureau of</p> <p>6 Economic Research, which is one of the strongest</p> <p>7 research organizations in the U.S., when they</p> <p>8 commissioned a book to analyze the effects of economic</p> <p>9 regulation across a variety of industries, I was asked</p> <p>10 to write the chapter on the cable and satellite</p> <p>11 industry.</p> <p>12 Q And have you testified before this Board</p> <p>13 before?</p> <p>14 A I have. I have been here once before.</p> <p>15 Q When was that?</p> <p>16 A That was in February of 2010 in the matter</p> <p>17 of the retransmission of digital broadcast signals on</p> <p>18 cable television systems.</p> <p>19 Q Were you accepted as an expert in those</p> <p>20 proceedings?</p> <p>21 A I believe I was.</p> <p>22 MR. CUNNIFF: Your Honor, at this point I</p>	1754	<p>1 front of us.</p> <p>2 Q And if you could turn to page 52 and just</p> <p>3 tell us if that's your signature.</p> <p>4 A It is.</p> <p>5 Q And did you draft this testimony?</p> <p>6 A I did. I drafted it with assistance from</p> <p>7 staff at Bates White, an economic consulting firm here</p> <p>8 in Washington.</p> <p>9 Q At the time you signed the written testimony</p> <p>10 was it true and correct to the best of your knowledge?</p> <p>11 A Yes, it was.</p> <p>12 MR. CUNNIFF: Your Honor, at this time I</p> <p>13 would move PSS Trial Exhibit 4 consisting of</p> <p>14 Dr. Crawford's written testimony with exhibits into</p> <p>15 evidence.</p> <p>16 MS. SINGER: No objection.</p> <p>17 MR. LEVIN: No objection.</p> <p>18 CHIEF JUDGE BARNETT: PSS Trial Exhibit 4 is</p> <p>19 admitted.</p> <p>20 (PSS Trial Exhibit Number 4</p> <p>21 was received into evidence.)</p> <p>22 MR. CUNNIFF: Thank you, Your Honor.</p>
1753	<p>1 would tender Dr. Crawford to the Board as an expert in</p> <p>2 the field of industrial economics.</p> <p>3 MS. SINGER: No objection.</p> <p>4 MR. LEVIN: No objection, Your Honor.</p> <p>5 CHIEF JUDGE BARNETT: Dr. Crawford is</p> <p>6 accepted as qualified.</p> <p>7 MR. CUNNIFF: Thank you, Your Honor.</p> <p>8 BY MR. CUNNIFF:</p> <p>9 Q Dr. Crawford, did you prepare written</p> <p>10 testimony in this case?</p> <p>11 A I did.</p> <p>12 Q Let me go ahead and hand out a copy of your</p> <p>13 written testimony, which is marked as PSS Trial</p> <p>14 Exhibit 4.</p> <p>15 (PSS Trial Exhibit Number 4 was</p> <p>16 marked for identification.)</p> <p>17 BY MR. CUNNIFF:</p> <p>18 Q Dr. Crawford, can you identify this</p> <p>19 document?</p> <p>20 A I can.</p> <p>21 Q And what is this?</p> <p>22 A This is my direct testimony in the matter in</p>	1755	<p>1 I would also note that a prior order of the</p> <p>2 Board dated May 2nd applied the protective order to</p> <p>3 limited portions of his testimony. I believe there is</p> <p>4 a public and a restricted version.</p> <p>5 BY MR. CUNNIFF:</p> <p>6 Q Dr. Crawford, what was the overall purpose</p> <p>7 of your report?</p> <p>8 A Well, counsel for Music Choice approached me</p> <p>9 and asked me to propose a range of reasonable</p> <p>10 royalties for the digital performing rights for sound</p> <p>11 recordings in markets with preexisting subscription</p> <p>12 services or commonly called PSS.</p> <p>13 Q And did you prepare demonstrative exhibits</p> <p>14 to aide your presentation?</p> <p>15 A I did.</p> <p>16 MR. CUNNIFF: Your Honor, I'd note for the</p> <p>17 record, obviously we are not moving this into</p> <p>18 evidence, we did put the restricted label at the</p> <p>19 bottom because some of the slides do, in fact, contain</p> <p>20 restricted material.</p> <p>21 BY MR. CUNNIFF:</p> <p>22 Q Dr. Crawford, let's turn to slide number</p>

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1756	<p>1 one, the page numbers in the bottom right-hand corner, 2 and let me just ask you how you first approached your 3 work in this case. 4 A Sure. So I understand that reasonable rates 5 for digital performance rights for sound recordings in 6 PSS are required to satisfy certain statutory 7 objectives, statutory policy objectives listed there 8 on slide 1, and that those reasonable rates have as a 9 reasonable upper limit a marketplace rate, a rate that 10 would arise as a marketplace outcome between a willing 11 buyer and a willing seller. 12 So with that understanding, I, of course, 13 first began my analysis trying to determine what would 14 be an appropriate marketplace rate, a rate that would 15 be obtained in a hypothetical market. Of course, the 16 rate is being determined in this proceeding, but a 17 useful benchmark for that rate would be the rate that 18 would be obtained in a hypothetical negotiation 19 between a willing buyer and a willing seller of those 20 rights. 21 And then once I had that marketplace rate, I 22 then determined to evaluate the statutory factors to</p>
1757	<p>1 determine what influence that would have on my 2 proposed recommendation. 3 Q I notice you used the term "negotiation" in 4 your answer. 5 Why is that? 6 A Well, in many markets in economics you have 7 a large number of sellers or a large number of buyers 8 or both. For example, a large number of consumers in 9 economics we often depict by drawing a downward 10 sloping demand curve and determine the price. 11 But in many other markets there are small 12 markets of buyers and sellers on each side of the 13 market, and in those settings marketplace outcomes are 14 better understood as the outcome of negotiations. 15 Q What are some examples of those type of 16 markets? 17 A Well, there are lot of examples in 18 negotiations. So for example, a labor union that 19 negotiates with a large employer would be a suitable 20 example. Or you could imagine a large manufacturer 21 like Proctor & Gamble negotiating with a large 22 retailer like Walmart over the wholesale price for</p>
1758	<p>1 products. 2 There are also a lot of examples in the 3 cable industry. I do a lot of work in the cable 4 industry. So, for example, cable television channels 5 or families of cable television channels often 6 negotiate with cable operators over the fees the 7 operator will pay the channel for the right to carry 8 that channel on their cable system. 9 Q And is a hypothetical market between 10 Music Choice and a record label for sound performing 11 rights similar to the markets you just talked about? 12 A In my opinion, yes. When I considered what 13 a hypothetical market would look like for the 14 negotiation of musical performance rights for sound 15 recordings in PSS, I concluded it would very likely 16 involve negotiations between a PSS provider on the one 17 hand and an individual record label on the other. 18 Q And in the field of economics how are such 19 markets typically analyzed? 20 A Well, negotiations are very commonly 21 analyzed in economics using a bargaining model. 22 Q And can you tell us what is a bargaining</p>
1759	<p>1 model? 2 A Sure. A bargaining model analyzes 3 situations where there is two or more parties that 4 have some kind of gain from trade. So if they work 5 together, there's some kind of, in this case, profit 6 that could be created, economic profit. And a 7 bargaining model helps determine whether or not an 8 agreement is reached, and if the agreement is reached, 9 how the surplus from the agreement is split between 10 the two or more parties. 11 Q And in your opinion, what bargaining model 12 most closely matches the hypothetical negotiations 13 between a record label and Music Choice? 14 A So right away I, you know, I thought of a 15 negotiation between a PSS provider and a record label. 16 and I thought that the most appropriate bargaining 17 model would be a bargaining model -- a non-cooperative 18 bargaining model called the asymmetric Nash bargaining 19 model. 20 JUDGE WISNIEWSKI: Dr. Crawford, excuse me. 21 I don't think that's the question that Mr. Cunniff 22 asked you.</p>

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1760	<p>1 THE WITNESS: Sorry.</p> <p>2 JUDGE WISNIEWSKI: I think you asked the</p> <p>3 question in terms of Music Choice and the record</p> <p>4 companies and you answered in terms of a PSS provider</p> <p>5 and the record companies.</p> <p>6 BY MR. CUNNIFF:</p> <p>7 Q And, Dr. Crawford, if you could just clarify</p> <p>8 that. My question was referring to Music Choice. You</p> <p>9 answered in terms of a PSS. If you could sync those</p> <p>10 up for us.</p> <p>11 A Sure, my pleasure. And my mistake for</p> <p>12 mishearing the question.</p> <p>13 The bargaining framework I proposed would</p> <p>14 apply to any PSS operator, including Music Choice, in</p> <p>15 negotiation with a record label.</p> <p>16 Q And I think you called the model the</p> <p>17 asymmetric Nash bargaining model; is that correct?</p> <p>18 A That's correct.</p> <p>19 Q And for us non-economists, does that have</p> <p>20 anything to do with the John Nash that was shown in</p> <p>21 the movie "A Beautiful Mind"?</p> <p>22 A It is one in the same. Professor Nash was,</p>	1762	<p>1 the Nash bargaining model?</p> <p>2 A I have.</p> <p>3 JUDGE WISNIEWSKI: Just go back a step. You</p> <p>4 indicated that was your opinion, but I don't think you</p> <p>5 indicated why that was your opinion.</p> <p>6 THE WITNESS: Okay. So I mean there are a</p> <p>7 number -- well, first I believe firmly that a</p> <p>8 non-cooperative approach where each party is acting in</p> <p>9 its own interest fits very well in the hypothetical</p> <p>10 market of a PSS provider negotiating with a record</p> <p>11 label over the terms -- over a royalty for digital</p> <p>12 performance rights for sound recordings. Sort of</p> <p>13 acting in their own interests fits well with the</p> <p>14 hypothetical market.</p> <p>15 Now, one can use a cooperative approach in</p> <p>16 these kinds of similar situations, but I think it's a</p> <p>17 harder fit.</p> <p>18 So, for example, one of the -- the reason</p> <p>19 it's a harder fit is that one needs participation from</p> <p>20 all the parties to reach -- to have any surplus at</p> <p>21 all. So, for example, a PSS operator needs the record</p> <p>22 label -- the rights from the record label, but also</p>
1761	<p>1 many years ago, was one of the first to propose</p> <p>2 solution concepts for these kinds of bargaining</p> <p>3 models.</p> <p>4 Q And why is the non-cooperative approach</p> <p>5 embodied in the Nash bargaining model appropriate to</p> <p>6 use in this case?</p> <p>7 A Well, the primary feature of the</p> <p>8 non-cooperative bargaining approach is it models the</p> <p>9 interaction of economic agents. So, for example, a</p> <p>10 PSS provider like Music Choice and the record label</p> <p>11 each trying to act in their own best interests in a</p> <p>12 negotiation setting.</p> <p>13 A cooperative bargaining approach, on the</p> <p>14 other hand, analyzes the cooperation between firms and</p> <p>15 what kind of cooperation are sustainable and the types</p> <p>16 of outcomes one might see using that approach in terms</p> <p>17 of the division of surplus from any agreement.</p> <p>18 And it was my opinion that the</p> <p>19 non-cooperative approach was much more suitable to the</p> <p>20 hypothetical market of a PSS provider and the record</p> <p>21 label than was the cooperative approach.</p> <p>22 Q Have you published any scholarly articles on</p>	1763	<p>1 needs the rights from performing rights organizations</p> <p>2 for the musical works. Those kinds of settings can be</p> <p>3 used in a cooperative approach, but then the solution</p> <p>4 that comes out of a cooperative approach sort of</p> <p>5 mechanically depends on the number of firms on each</p> <p>6 side of the market rather than on more fundamental</p> <p>7 economics. So that seemed unattractive to me. I</p> <p>8 preferred the non-cooperative approach instead.</p> <p>9 JUDGE WISNIEWSKI: Mr. Cuniff.</p> <p>10 BY MR. CUNNIFF:</p> <p>11 Q Dr. Crawford, I think you were talking about</p> <p>12 articles you had published on the Nash bargaining</p> <p>13 model. Have you, in fact, published scholarly</p> <p>14 articles?</p> <p>15 A I have. Just recently I had a paper with a</p> <p>16 co-author come out in the American Economic Review</p> <p>17 just two months ago that did a number of things. But</p> <p>18 one of the things it did was to incorporate the</p> <p>19 estimation of bargaining parameters that comes out of</p> <p>20 an asymmetric Nash bargaining model, and this was in</p> <p>21 the context of the cable and satellite cable</p> <p>22 industries.</p>

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1764	<p>1 So in that paper we tried to estimate the</p> <p>2 relative bargaining power of families of cable channel</p> <p>3 owners, for example, Disney, Viacom, relative to cable</p> <p>4 operators, relative to a representative large cable</p> <p>5 operator, representative of a small cable operator,</p> <p>6 and each of the two satellite providers.</p> <p>7 Q If you can, give us an overview how you used</p> <p>8 the Nash bargaining model in your work on this case.</p> <p>9 A Well, in this case I used it in three ways.</p> <p>10 The first way is I used it to try to get a deeper</p> <p>11 understanding what a hypothetical marketplace outcome</p> <p>12 would be. So I really tried -- and this is one of the</p> <p>13 things the professors in industrial economics do, is</p> <p>14 when you're confronted with a new industry, we try to</p> <p>15 understand sort of what are the mechanisms generating</p> <p>16 the outcomes in the industry, where outcomes can be</p> <p>17 royalty rates, quantities of subscribers, anything</p> <p>18 that might be of interest.</p> <p>19 And so right away I felt that this</p> <p>20 non-cooperative bargaining model, which is the</p> <p>21 asymmetric Nash bargaining model, could very much help</p> <p>22 me understand how a hypothetical market would work for</p>	1766	<p>1 would be based on those Nash factors.</p> <p>2 Q And did you find the Nash framework to be</p> <p>3 useful in your work?</p> <p>4 A I did, I found it to be extremely useful.</p> <p>5 Q Well, if we could, let's start out talking</p> <p>6 about the Nash bargaining model I guess in general</p> <p>7 terms, and you've already used this term before, but</p> <p>8 what is the hypothetical market you have used in your</p> <p>9 analysis?</p> <p>10 A Well, in my analysis the hypothetical market</p> <p>11 that I have in mind is negotiations between an</p> <p>12 individual PSS operator, like Music Choice, in</p> <p>13 negotiations with an individual record label over the</p> <p>14 digital performance rights for sound recordings.</p> <p>15 Q The hypothetical market is the market for</p> <p>16 sound recordings, but is that the only market that's</p> <p>17 relevant here?</p> <p>18 A No, there's actually -- the hypothetical</p> <p>19 market is characterized, in my opinion, by</p> <p>20 negotiations between a PSS provider and a record</p> <p>21 label. But there are at least three other markets</p> <p>22 that also matter in determining what is the outcome</p>
1765	<p>1 the licensing of digital performance rights for sound</p> <p>2 recordings in PSS. That was the first way, which was</p> <p>3 sort of to get myself grounded.</p> <p>4 Then with that in hand I used then that</p> <p>5 framework to help evaluate potential benchmark</p> <p>6 markets. We don't observe outcomes in the</p> <p>7 hypothetical market because it is hypothetical. But</p> <p>8 understanding the features of the bargaining model</p> <p>9 that determine outcomes in a hypothetical market and</p> <p>10 comparing those to the same features that determine</p> <p>11 outcomes in markets where we do see, for example,</p> <p>12 royalty rates, proved very useful for me to help</p> <p>13 evaluate the suitability of alternate benchmarks.</p> <p>14 And then there is actually a third one.</p> <p>15 Q All right. Let's hear it.</p> <p>16 A And then I also then used the Nash</p> <p>17 framework. When evaluating the statutory factors, I</p> <p>18 tried to match Music Choice's financial data, income</p> <p>19 statements and balance sheets to those Nash factors to</p> <p>20 try to actually estimate, to the extent I could, what</p> <p>21 an outcome in such a hypothetical market could be and,</p> <p>22 therefore, what a reasonable range of royalty rates</p>	1767	<p>1 of, for example, a royalty rate in that hypothetical</p> <p>2 market.</p> <p>3 The three markets that also matter are</p> <p>4 markets for other inputs into that market. So, for</p> <p>5 example, a PSS provider also needs a license for the</p> <p>6 musical works underlying the sound recordings, and</p> <p>7 that market is important.</p> <p>8 A second market that is also important is</p> <p>9 the market for the outputs of the PSS provider itself.</p> <p>10 So PSS providers take these rights, package them into</p> <p>11 audio channels and produce a number of those channels</p> <p>12 and then sell the rights to distribute those channels</p> <p>13 to cable systems. So that's sort of the output market</p> <p>14 for a PSS operator. Output markets are generally</p> <p>15 important to understand outcomes within the Nash</p> <p>16 bargaining framework.</p> <p>17 And then perhaps the most important other</p> <p>18 market that also matters is markets served -- markets</p> <p>19 outside the hypothetical market that are served by the</p> <p>20 same buyers or sellers.</p> <p>21 So in my testimony today that's going to be</p> <p>22 particularly important, markets served by other</p>

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1768	<p>1 sellers.</p> <p>2 So, for example, a seller might license</p> <p>3 rights into the PSS market, but they might also either</p> <p>4 license those rights to another market or they may</p> <p>5 sell physical and actually distribute physical product</p> <p>6 in the form of CDs, that kind of thing.</p> <p>7 Those other markets are also important to</p> <p>8 outcomes in the PSS market.</p> <p>9 Q And I believe earlier you mentioned that the</p> <p>10 Nash bargaining model tends to be used to analyze</p> <p>11 negotiations between a small number of buyers and</p> <p>12 sellers?</p> <p>13 A That's right.</p> <p>14 Q And I understand from your report that you</p> <p>15 chose to model negotiations here between only a single</p> <p>16 buyer and a single seller; is that correct?</p> <p>17 A That's correct.</p> <p>18 Q And why did you do that?</p> <p>19 A Well, I really did it purely for simplicity.</p> <p>20 As you'll see, sort of communicating the idea of an</p> <p>21 asymmetric Nash bargaining model is challenging enough</p> <p>22 with only one buyer and one seller. And so in the</p>	1770	<p>1 Q What are, in just an overview, the general</p> <p>2 factors in the Nash framework?</p> <p>3 A Sure. So it turns out in an asymmetric Nash</p> <p>4 bargaining model there are three key Nash factors that</p> <p>5 determine outcomes in the model, and these three key</p> <p>6 Nash factors are listed out in slide number 2.</p> <p>7 The first key Nash factor is what's called</p> <p>8 the combined agreement surplus. This is the economic</p> <p>9 profit available in the primary market, which we can</p> <p>10 think of as just the PSS market. So it's the economic</p> <p>11 profit available in the PSS market if a deal can be</p> <p>12 reached between, for example, a PSS operator and a</p> <p>13 record label.</p> <p>14 Q And the next one -- let me get this straight</p> <p>15 in my head. I think you used the term "economic</p> <p>16 profit"?</p> <p>17 A I did.</p> <p>18 Q Why don't you go ahead and define that for</p> <p>19 us.</p> <p>20 A Economic profit is very closely related to</p> <p>21 conventional notions of profit or accounting profit,</p> <p>22 but there's two differences in trying to understand</p>
1769	<p>1 presence of multiple potential buyers and multiple</p> <p>2 potential sellers, each negotiating bilaterally still,</p> <p>3 so it's only one-on-one negotiations, but there being</p> <p>4 multiple, for example, record labels, that complicates</p> <p>5 the analysis but it doesn't change any of my</p> <p>6 qualitative negotiations.</p> <p>7 In fact, bringing the additional</p> <p>8 negotiations in would only strengthen my conclusions;</p> <p>9 therefore, it's conservative to leave them out. I</p> <p>10 think it's also much, much simpler to leave them out,</p> <p>11 so I chose to leave them out.</p> <p>12 Q And we thank you for that.</p> <p>13 But do you lose any insight by considering</p> <p>14 just a single buyer and seller?</p> <p>15 A No, I don't. All the challenges that would</p> <p>16 arise in a more complicated model analyzing what I</p> <p>17 would call an equilibrium of negotiations arise from</p> <p>18 just looking at a single buyer and a single seller.</p> <p>19 Q And, Dr. Crawford, let me turn your</p> <p>20 attention to slide 2 of your demonstratives.</p> <p>21 Do you have that in front of you?</p> <p>22 A I do.</p>	1771	<p>1 outcomes in the asymmetric Nash bargaining model.</p> <p>2 The first is that typical notions of profit</p> <p>3 are often understood to be returns on the capital</p> <p>4 invested in the firm, so how profitable is the firm</p> <p>5 you might view that in conventional wisdom.</p> <p>6 But in economics we treat that simply as the</p> <p>7 return to capital is the cost of the firm. It is not</p> <p>8 part of the profit of the firm. It is one of the</p> <p>9 costs a firm needs to operate its business. We will</p> <p>10 see this later in Music Choice's financial statements</p> <p>11 where I'm going to talk about Music Choice's capital</p> <p>12 as a cost.</p> <p>13 There's another difference too. Because we</p> <p>14 are trying to understand the outcome in negotiations</p> <p>15 between a PSS provider and a record label, whatever</p> <p>16 royalty is going on between them is taken out. That</p> <p>17 is not considered a cost because that is the thing we</p> <p>18 are going to figure out in the model.</p> <p>19 So the economic profit here is just like</p> <p>20 regular profit if you take out the cost of capital and</p> <p>21 put back in the royalty payments that will later be</p> <p>22 determined by the model.</p>

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1772	<p>1 Q So in your analysis when you refer to</p> <p>2 "profit," you are referring to economic profit?</p> <p>3 A Yes. Whenever I say "profit," I will be</p> <p>4 referring to economic profit.</p> <p>5 Q And the number two point, threat points,</p> <p>6 what is that?</p> <p>7 A Threat points -- so just to remind you, the</p> <p>8 combined agreement surplus was the profit available in</p> <p>9 the primary market, the PSS market.</p> <p>10 The threat points -- each party in a</p> <p>11 negotiation will have their own threat point, so there</p> <p>12 will be two, and each threat point will be the profit</p> <p>13 available to each party from all markets in the case</p> <p>14 of a disagreement. In other settings I called it a</p> <p>15 threat point, but in other bargaining contexts people</p> <p>16 just call it a no-agreement profit.</p> <p>17 Q And then just going to the next point,</p> <p>18 bargaining power, explain that for us.</p> <p>19 A Sure. Bargaining power, as it says on the</p> <p>20 slides, really just measures the strength of each firm</p> <p>21 in the negotiations.</p> <p>22 Q And is that the same as sort of size,</p>	1774	<p>1 proceeding there would be maybe a third step, which</p> <p>2 would be to understand the share of economic profit in</p> <p>3 revenue to then convert the predictions from the model</p> <p>4 to a revenue royalty rate.</p> <p>5 Q Well, let's go ahead and turn to slide</p> <p>6 number 3 entitled "Nash Bargaining Model Equals</p> <p>7 Bargaining Power Setting."</p> <p>8 I assume that's at least a homemade pie</p> <p>9 there.</p> <p>10 A Yeah.</p> <p>11 Q Why don't you walk us through this example</p> <p>12 of a Nash factor.</p> <p>13 A I'm well aware that -- I worry, I should</p> <p>14 say, that sometimes Nash bargaining models can be very</p> <p>15 complicated, so I've tried with a series of examples</p> <p>16 to make them more comprehensible. So this is the</p> <p>17 simplest example. All right?</p> <p>18 And so as I mentioned earlier, there are</p> <p>19 three key Nash factors that determine outcomes in a</p> <p>20 Nash bargaining model, and you can see these three key</p> <p>21 factors at the top of the page where it says,</p> <p>22 "Combined surplus minus threat points equal pie to be</p>
1773	<p>1 economic size?</p> <p>2 A No, not at all. Not necessarily. In the</p> <p>3 academic literature bargaining power is most tightly</p> <p>4 tied to the patience of a firm in negotiation. Now,</p> <p>5 size could be related to patience in some settings,</p> <p>6 but it doesn't have to be.</p> <p>7 Q And in general terms how do these factors</p> <p>8 determine a royalty?</p> <p>9 A Well, there's actually three steps to how</p> <p>10 the Nash factors determine a royalty.</p> <p>11 The first two factors, the combined</p> <p>12 agreement surplus minus the threat points, and you'll</p> <p>13 see this on the next slide, those two are combined to</p> <p>14 determine the size of the pie. At the end of the day</p> <p>15 Nash bargaining is trying to describe how a particular</p> <p>16 pie is being split. And so one and two together, they</p> <p>17 determine the size of the pie, and the bargaining</p> <p>18 power determines the split of the pie.</p> <p>19 Now, in the academic economics literature</p> <p>20 you would often stop there, but for this proceeding</p> <p>21 royalties are determined as a share of revenue rather</p> <p>22 than as a share of economic profit. So in this</p>	1775	<p>1 split." Well, the first two, and then -- that is the</p> <p>2 first two of the factors and then the bargaining power</p> <p>3 is just above it. So the first two of the factors are</p> <p>4 the combined surplus and the threat points.</p> <p>5 So in this simple example I have in mind a</p> <p>6 single seller and a single buyer that have to work</p> <p>7 together in order to sell a product to someone</p> <p>8 downstream. It could be the consumer.</p> <p>9 If they can reach an agreement, I assumed</p> <p>10 their combined surplus is 20. The numbers here are</p> <p>11 just to be illustrative. They don't have any meaning.</p> <p>12 All right.</p> <p>13 So if they can reach an agreement, they get</p> <p>14 20. Now, this is economic profit of 20. So this is,</p> <p>15 after covering each of their costs, this is the</p> <p>16 surplus or economic profit available to be split if</p> <p>17 they can reach an agreement. That's the combined</p> <p>18 surplus.</p> <p>19 In the simple example I assumed that -- now,</p> <p>20 threat points are what they can earn in the absence of</p> <p>21 an agreement. So if they reach an agreement, they can</p> <p>22 get 20. If they can't reach an agreement, for</p>

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1776	<p>1 simplicity I'm assuming they can only get -- they each 2 can get two. And that makes it quite easy. If 3 neither one can get anything in the absence of an 4 agreement, then the pie to be split, which is just the 5 combined surplus minus the threat point, is still 20. 6 So if the pie to be split is 20 and by 7 assumption each party has equal bargaining power, 8 well, then the division is quite simple. The pie is 9 split 50/50, each party gets half of the economic 10 profit. 11 And remember I have in mind here a seller, 12 for example, a seller of a right selling it to a buyer 13 who sells to a market further downstream. Of course 14 the buyer is the one doing the selling to the consumer 15 so they get the full 20, but the model suggests they 16 share half of that 20. 17 Q Thank you, Dr. Crawford. 18 Now, in this simple example the hypothetical 19 market would purchase sound recording rights by 20 Music Choice, PSS? 21 A In some ways, yes, but it is missing one 22 more thing.</p>	1778	<p>1 A I do. 2 Q If we could just walk through that example 3 which is entitled "Application to the Hypothetical 4 Market." 5 In the column on the left it says, "Combined 6 Surplus." 7 Can you explain that to us? 8 A Sure. In the previous slide I presented a 9 simple sort of theoretical example of how the 10 asymmetric Nash bargaining model would work. 11 Now, in this slide I'm applying the same 12 ideas to the hypothetical market, which is, if you 13 recall, understanding the negotiation between an 14 individual PSS and an individuals record label. 15 So, as before, the combined surplus is just 16 the economic profit from the PSS market that would 17 arise if the record label and the PSS provider could, 18 in fact, reach an agreement. For simplicity, I kept 19 the same number 20. The only difference is now, to 20 sort of demonstrate that it's the PSS market, I have a 21 little image there which shows a family sitting in 22 front of their TV flipping through one of the</p>
1777	<p>1 Q And what is that missing element? 2 A Well, it's missing the fact that in the PSS 3 market I mentioned earlier that the seller of digital 4 performance rights for sound recordings also sell in 5 other markets and the fact that the copyright owners 6 for sound recording rights sell in these other 7 markets, that will influence one of these features, 8 the threat market. 9 Q What other markets do you have in mind? 10 A Well, in addition to licensing sound 11 recording rights to a PSS, the copyright owner of 12 sound recording rights or a record label, they can 13 distribute music by CD sales or digital downloads. 14 Q Let's go ahead and turn to slide number 15 four. 16 CHIEF JUDGE BARNETT: Before we go there, 17 let's take our afternoon recess. 18 (Brief recess) 19 BY MR. CUNNIFF: 20 Q Dr. Crawford, I believe before the break we 21 had turned to slide 4 of your demonstrative package. 22 Do you have that in front of you?</p>	1779	<p>1 Music Choice channels. But, otherwise, there's no 2 difference from the previous example. 3 Q Thank you. And I think in the middle it 4 says "Threat Points." If you could walk through that 5 column for us. 6 A Right. So this is where we're getting our 7 big deviation from the last slide. the simple example. 8 And if you recall, the threat point is the 9 profit from all markets in the absence of an 10 agreement. So I think -- actually, let me do the PSS 11 provider first. If a PSS provider cannot reach an 12 agreement with the record label. and of course they 13 have no service to sell, so their economic profit is 14 simply zero. 15 But it's different for the record label 16 because the premise in this slide, and one of the 17 principal conclusions in my report, is that the PSS 18 service provides a promotional benefit to record 19 labels, and I'm going to provide evidence for the 20 promotional benefit in a moment. but I'd like to first 21 discuss what that promotional benefit means in the 22 context of a threat point.</p>

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1780	<p>1 So the idea here is, for the promotional</p> <p>2 benefit, is that one of the people sitting on a couch</p> <p>3 listens to a song on Music Choice, or on the PSS</p> <p>4 provider -- for example, Music Choice -- he likes the</p> <p>5 song, and then goes to buy a CD. Now, the threat</p> <p>6 point for the record label is the profit to the record</p> <p>7 label in the case of no agreement.</p> <p>8 Well, if there is the agreement, then the</p> <p>9 person on the couch buys the CD. But if there is no</p> <p>10 agreement, then the person on the couch does not</p> <p>11 see -- does not hear the song and does not buy the CD.</p> <p>12 And it is for that reason that their threat point, in</p> <p>13 fact, is negative.</p> <p>14 So not only do they not make any money in</p> <p>15 the PSS market -- so they also get zero in the PSS</p> <p>16 market in the case of disagreement -- but, in addition</p> <p>17 to that, they also lose any profit that they might</p> <p>18 have otherwise gotten because of the promotional</p> <p>19 benefit of the PSS.</p> <p>20 JUDGE ROBERTS: Mr. Crawford, is that in the</p> <p>21 short term or the long term, the loss to the record</p> <p>22 labels?</p>
1782	<p>1 pays its costs in the case that it actually offers the</p> <p>2 service on when it reaches an agreement with the</p> <p>3 record label. But we could consider the implications</p> <p>4 of that abstraction in the future if you'd like.</p> <p>5 BY MR. CUNNIFF:</p> <p>6 Q Let me get it straight. If the promotional</p> <p>7 benefit is positive, then why is the threat point, at</p> <p>8 least for the record label, negative?</p> <p>9 A The threat point is negative because this is</p> <p>10 the profit in the absence of an agreement. So because</p> <p>11 they reach -- they get a promotional benefit in the</p> <p>12 case of the agreement. If there is no agreement, they</p> <p>13 lose that promotional benefit and, therefore, it</p> <p>14 becomes a negative. So it is certainly possible to</p> <p>15 have negative threat points. That is not at all</p> <p>16 unusual.</p> <p>17 Q So you are worse than zero?</p> <p>18 A Exactly.</p> <p>19 Q I think you mentioned the promotional</p> <p>20 benefits.</p> <p>21 What did you look at to understand the</p> <p>22 promotional benefits in this context?</p>
1781	<p>1 THE WITNESS: So, in principle, the outcomes</p> <p>2 in these bargaining models are meant to be long-term</p> <p>3 outcomes. So it would be -- if there were no</p> <p>4 disagreement in the long -- excuse me. If there was</p> <p>5 no agreement between the PSS provider and the record</p> <p>6 label in the long run, that would represent a loss in</p> <p>7 promotional benefits to the record company.</p> <p>8 JUDGE ROBERTS: I'm just wondering, at least</p> <p>9 in the short run, the loss to the PSS service is far</p> <p>10 more significant than the loss to the record company?</p> <p>11 THE WITNESS: Right. These -- I mean, the</p> <p>12 models must necessarily abstract from certain elements</p> <p>13 of the real world but try to capture the most salient</p> <p>14 elements.</p> <p>15 So the models I'm going to be presenting to</p> <p>16 you today are really meant to be long-run models. So,</p> <p>17 of course, in the short run I agree with you there</p> <p>18 would be potential disruptions and such.</p> <p>19 Strictly speaking, this model also assumes</p> <p>20 there's not much in the way of fixed costs. So the</p> <p>21 idea is that the PSS provider, if it doesn't reach an</p> <p>22 agreement, it doesn't have to pay anything. It only</p>
1783	<p>1 A I have three primary reasons, I think, from</p> <p>2 my conclusion that there are important promotional</p> <p>3 benefits of a PSS service. The first is largely</p> <p>4 precedential. In preparing to write my report, I, of</p> <p>5 course, read the previous decision -- the last</p> <p>6 previous decision for a PSS proceeding, which was in</p> <p>7 1996, where the librarian of Congress, in fact, found</p> <p>8 there was a promotional benefit and that this</p> <p>9 finding -- or the librarian's decision was upheld by</p> <p>10 the D.C. Circuit. That's one sort of piece of</p> <p>11 supporting evidence.</p> <p>12 And, truthfully, while that information is</p> <p>13 old, if one looks at Damon Williams' testimony, he</p> <p>14 provides significant evidence that whatever</p> <p>15 promotional benefits there were in 1996 are likely to</p> <p>16 be much, much larger now due to the technological</p> <p>17 innovations in terms of on-screen display and artist</p> <p>18 trivia that really try to engage the listener.</p> <p>19 The second reason is largely based on Damon</p> <p>20 Williams' testimony that I found quite convincing</p> <p>21 that -- he describes at length the many, many contacts</p> <p>22 that he has in his position at Music Choice.</p>

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1784	<p>1 Q Dr. Crawford, if I can interrupt. I assume</p> <p>2 you are referring to the written testimony of</p> <p>3 Mr. Williams?</p> <p>4 A Thank you for that clarification. Yes, I'm</p> <p>5 referring to the written testimony of Damon Williams</p> <p>6 that provide examples of many direct communications</p> <p>7 from record labels that speak to the promotional</p> <p>8 benefit that Music Choice provides. He provides</p> <p>9 examples like telephone calls -- weekly telephone</p> <p>10 calls, e-mails, plaques that reward for records sold,</p> <p>11 not just for airplay but actual records sold.</p> <p>12 I believe in his written testimony he has an</p> <p>13 example of songs that were played on Music Choice that</p> <p>14 were then later picked up on terrestrial broadcast</p> <p>15 radio where the presumption was that that also had a</p> <p>16 promotional benefit on the sales.</p> <p>17 So that was a second sort of piece of</p> <p>18 supporting evidence for this promotional viewpoint.</p> <p>19 And then there is some strong empirical</p> <p>20 evidence as well provided by some of the surveys that</p> <p>21 I cite in my report. The evidence I think from the</p> <p>22 surveys I find most convincing is that the National</p>	1786	<p>1 that aren't necessarily available on terrestrial</p> <p>2 radio, and that these type of consumers enjoy those</p> <p>3 genres and that it is not sufficient to hear them;</p> <p>4 they want to own them, so they go out and purchase</p> <p>5 them.</p> <p>6 Q Let's go back to the slide. We're still on</p> <p>7 slide --</p> <p>8 JUDGE WISNIEWSKI: Before we go on,</p> <p>9 Mr. Cunniff, I just want to make sure I understand how</p> <p>10 this works mechanically.</p> <p>11 So if, for example, after hearing all the</p> <p>12 evidence, we did not agree with your assumptions</p> <p>13 concerning promotional benefit and indeed found a</p> <p>14 substitution effect, then this threat point would have</p> <p>15 a positive value; is that correct?</p> <p>16 THE WITNESS: That's correct. And, in fact,</p> <p>17 we will see an example later of another market where I</p> <p>18 believe there is a substitutional benefit, and you</p> <p>19 will see the positive effects.</p> <p>20 JUDGE WISNIEWSKI: Thank you.</p> <p>21 BY MR. CUNNIFF:</p> <p>22 Q Dr. Crawford, why don't we go to that far</p>
1785	<p>1 Association of Recording Merchandisers, NARM,</p> <p>2 conducted a survey which was not, I believe, sponsored</p> <p>3 by Music Choice which demonstrates that Music Choice</p> <p>4 listeners tended to be among the most committed music</p> <p>5 lovers.</p> <p>6 So they -- the survey company categorized</p> <p>7 all music listeners into five different types -- four</p> <p>8 or five -- and this committed type was only 10 percent</p> <p>9 of the population but they were explorers; they were</p> <p>10 interested in learning about new music. They -- even</p> <p>11 though they were 10 percent of the population, they</p> <p>12 purchased 45 percent of total CDs. And these were the</p> <p>13 types of consumers that were most likely to be</p> <p>14 listening to Music Choice.</p> <p>15 And so -- I always worry about correlations</p> <p>16 and whether they are indicators of a true causal</p> <p>17 effect, but here I really think it is -- there is</p> <p>18 strong evidence that the people that listen to</p> <p>19 Music Choice are interested in different kinds of</p> <p>20 music.</p> <p>21 As Damon Williams, in his written testimony,</p> <p>22 described, Music Choice offers many different genres</p>	1787	<p>1 right column, pie to be split.</p> <p>2 A Sure. So based on -- this, of course, I</p> <p>3 believe there to be a promotional effect, and that's</p> <p>4 reflected here. But let me walk through the rest of</p> <p>5 it because the implications of this promotional effect</p> <p>6 are quite interesting in terms of the actual royalties</p> <p>7 from the PSS market.</p> <p>8 So we have the combined agreement surplus of</p> <p>9 20. To determine the pie to be split, we actually</p> <p>10 subtract -- so we're taking 20, we're subtracting a</p> <p>11 minus four, so the total pie to be split is actually</p> <p>12 24. And if it feels a little weird to be subtracting</p> <p>13 a minus four, it's not that bad in the sense that the</p> <p>14 pie to be split really is the total surplus across all</p> <p>15 markets.</p> <p>16 And so there's 20 surplus from the PSS</p> <p>17 market and, like we said, there was a surplus of four</p> <p>18 to the record labels from the promotional benefit in</p> <p>19 the case of agreement. And so the total surplus, the</p> <p>20 total pie to be split is 24.</p> <p>21 But the way it's split is now a little</p> <p>22 unusual because what the bargaining model is going to</p>

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1788	<p>1 do is it's going to tell us how do we split profit</p> <p>2 from just the PSS market. All right.</p> <p>3 And so if we have a total pie of 24 and we</p> <p>4 have equal bargaining power, well, we would expect a</p> <p>5 split of 12 and 12, and that's exactly what the</p> <p>6 picture shows, a split of 12 and 12.</p> <p>7 On the right-hand side of the circle, the</p> <p>8 PSS provider gets 12 from the PSS market. The record</p> <p>9 label, however, only gets eight from the PSS market.</p> <p>10 Now, if that seems unfair, remember that the record</p> <p>11 label is also getting an additional four from the</p> <p>12 additional benefit from CD sales. So the record</p> <p>13 label, in the end, also gets 12 because here we're</p> <p>14 assuming equal bargaining power. But to make the</p> <p>15 numbers work overall, we need to distort a little bit</p> <p>16 the share that the record label gets from the PSS</p> <p>17 market.</p> <p>18 And that's why it says, just underneath that</p> <p>19 circle, that the record label's share of the PSS</p> <p>20 profit is only 40 percent, eight out of the 20 from</p> <p>21 the PSS market. Of course, their share in the overall</p> <p>22 profit is still 50 percent. So that's how the</p>	1790	<p>1 We've looked at the hypothetical market.</p> <p>2 Earlier we talked about the potential benchmark</p> <p>3 markets. And I believe you said you would use the</p> <p>4 Nash bargaining model to evaluate the suitability of</p> <p>5 alternative benchmark markets; is that correct?</p> <p>6 A That is correct. In fact, the figure we</p> <p>7 just finished was sort of the first use of the Nash</p> <p>8 bargaining model. It was so that I could understand</p> <p>9 the hypothetical market. But now that I have sort of</p> <p>10 an understanding of the hypothetical market, I can use</p> <p>11 the same model to help evaluate alternative benchmark</p> <p>12 markets. This is the second use.</p> <p>13 Q Which potential benchmark markets did you</p> <p>14 look at?</p> <p>15 A Well, I looked at a wide variety of</p> <p>16 potential benchmark markets that had been either</p> <p>17 proposed in the previous proceedings for PSS -- for</p> <p>18 the determination of royalties in the PSS market, as</p> <p>19 well as in the determination for royalties in S-SCARS</p> <p>20 (phonetic) and an interactive webcasting model.</p> <p>21 Q And what criteria did you use in that</p> <p>22 evaluation?</p>
1789	<p>1 bargaining model can handle profits in other markets</p> <p>2 outside of the primary market of interest.</p> <p>3 One last comment is the very last section in</p> <p>4 the lower right, I would like to make this distinction</p> <p>5 that I mentioned earlier, that bargaining models</p> <p>6 always work simply with divisions of profit.</p> <p>7 But, of course, in this proceeding we are</p> <p>8 working with revenue royalty rates. So in order to</p> <p>9 convert a division of profit into a revenue royalty</p> <p>10 rate, we have to know what is the share of revenues</p> <p>11 that are profit in the target market.</p> <p>12 So the way to read that last line is if</p> <p>13 pre-royalty PSS profit -- in other words, if</p> <p>14 pre-royalty PSS profit is 5 percent of revenue, then</p> <p>15 the record label would share 40 percent of that 5</p> <p>16 percent and the revenue royalty would be 2 percent.</p> <p>17 So there is a mechanism to translate profit</p> <p>18 divisions from the bargaining model into revenue</p> <p>19 royalty rates if we know the share of profit and</p> <p>20 revenue.</p> <p>21 Q Thank you. Dr. Crawford. Let's go ahead and</p> <p>22 turn to the next slide, slide 5.</p>	1791	<p>1 A Well, the first thing I tried to do is I</p> <p>2 tried to enumerate what would be the features of an</p> <p>3 ideal benchmark market. Of course, we have our</p> <p>4 hypothetical market, but we know it's hypothetical.</p> <p>5 So we would like to find a target market, target</p> <p>6 benchmark market, that matches as closely as possible</p> <p>7 with many features of the hypothetical market. So I</p> <p>8 tried to identify which features would be good to</p> <p>9 match.</p> <p>10 Q When you say "features," what are examples</p> <p>11 of some of the features that would make it an ideal</p> <p>12 benchmark?</p> <p>13 A First, a good feature would be if the</p> <p>14 benchmark market was an actual marketplace outcome, if</p> <p>15 it had the same buyers, if it had the same sellers of</p> <p>16 the same rights, if the buyers of those rights used</p> <p>17 those rights in other products that they sold on</p> <p>18 similar markets as compared to the hypothetical</p> <p>19 market, and ten if the ultimate users of those rights</p> <p>20 used the services that they purchased in similar ways.</p> <p>21 Q And did you compare the market for musical</p> <p>22 works royalties PSS with the hypothetical market for</p>

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1792	<p>1 sound recording rights?</p> <p>2 A I did.</p> <p>3 Q I guess we have slide 5 in front of us. Why</p> <p>4 don't you walk through that slide for us.</p> <p>5 A Sure. Well, one of my conclusions in my</p> <p>6 report that I'll justify in my testimony here in the</p> <p>7 next few minutes is that I think the market for</p> <p>8 musical works, for digital performance rights for</p> <p>9 musical works in PSS markets is an excellent</p> <p>10 benchmark. And I reached that conclusion because it</p> <p>11 shares many of the same similarities with the</p> <p>12 hypothetical market.</p> <p>13 And so if you look on slide 5, in both cases</p> <p>14 we have the same buyers, PSS markets. In both cases</p> <p>15 those buyers are selling on to cable operators. Most</p> <p>16 cable operators are selling on to consumers. And so</p> <p>17 everything from sort of PSS on down is the same in the</p> <p>18 two markets.</p> <p>19 Of course, not everything is the same. The</p> <p>20 seller of the rights are different in the two markets.</p> <p>21 So in the hypothetical market we have record labels</p> <p>22 licensing digital performance rights for sound</p>	1794	<p>1 So the fact that, in the PRO market, there</p> <p>2 is a compulsory license whereas, in our hypothetical</p> <p>3 market, there isn't, in my opinion, that would not</p> <p>4 have a material effect on its use as a benchmark.</p> <p>5 On the issue of the fact that the rates -- I</p> <p>6 understand rates for musical work negotiated with PROs</p> <p>7 are governed by -- are set on a reasonable fee basis,</p> <p>8 it is my understanding that those fees are governed by</p> <p>9 a willing buyer/willing seller standard which is meant</p> <p>10 to approximate marketplace outcomes.</p> <p>11 So, similarly, the hypothetical market -- in</p> <p>12 the hypothetical market, which really would be a</p> <p>13 marketplace outcome, it should be well approximated by</p> <p>14 the rate rules in place for musical works under that</p> <p>15 compulsory license.</p> <p>16 Q Let's talk about, I guess, the second</p> <p>17 difference you mentioned that there are, in fact,</p> <p>18 different sellers selling different rights.</p> <p>19 A Yes. Absolutely.</p> <p>20 Q Why does that musical work royalty still</p> <p>21 provide a good potential benchmark?</p> <p>22 A Well, to evaluate that question, I want to</p>
1793	<p>1 recordings, and of course in the benchmark market for</p> <p>2 musical works we have performing rights organizations</p> <p>3 licensing digital performance rights for the musical</p> <p>4 works underlying those sound recordings.</p> <p>5 And, furthermore, the PRO market is</p> <p>6 influenced by the nature of the compulsory license and</p> <p>7 the rate determination process that determined those</p> <p>8 rates.</p> <p>9 Q Let's talk about that. Is that material.</p> <p>10 that the PRO's license rights under a compulsory</p> <p>11 licensing scheme is on a reasonable fee basis?</p> <p>12 A No. I don't feel it is at all. And the</p> <p>13 reason is twofold. First, the fact that it's a</p> <p>14 compulsory license would not yield a different</p> <p>15 prediction from the hypothetical market as long as the</p> <p>16 surplus -- as long as there are positive gains from</p> <p>17 trade for record labels to license their rights to a</p> <p>18 PSS operator, which, based on my later analysis of</p> <p>19 Music Choice's financial income statements and balance</p> <p>20 sheet, there is that reason. So as long as there are</p> <p>21 positive gains from trade, the theory predicts that an</p> <p>22 agreement would be reached.</p>	1795	<p>1 understand more carefully what would be the</p> <p>2 implications for the Nash factors in both the</p> <p>3 hypotheticals.</p> <p>4 We have already described a little bit the</p> <p>5 Nash factors for the hypothetical market in the</p> <p>6 previous figure, and then I compared those to the same</p> <p>7 Nash factors that would influence outcomes in the</p> <p>8 musical works market, the target benchmark market, and</p> <p>9 I found them to be extremely similar.</p> <p>10 Q What about for the -- did you look at any</p> <p>11 legal precedent that spoke to using musical works as a</p> <p>12 benchmark?</p> <p>13 A That's right as well. So there were two</p> <p>14 reasons. The fact that the Nash factors were both so</p> <p>15 similar and the fact that there was also this</p> <p>16 precedent that I mentioned earlier from the previous</p> <p>17 proceedings of using a musical works benchmark in the</p> <p>18 previous PSS proceeding.</p> <p>19 Q Hopefully we can do this briskly, but the</p> <p>20 Nash factors for the musical works royalty market,</p> <p>21 what would the combined agreement surplus -- how would</p> <p>22 that compare to the hypothetical?</p>

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1796	<p>1 A So without, I fear, going through a lot of</p> <p>2 detail and losing everyone -- so I'll try to summarize</p> <p>3 the main insights from this comparison.</p> <p>4 So what I'm going to do is just quickly</p> <p>5 compare the Nash factors from the hypothetical market</p> <p>6 for sound recordings in PSS with my preferred</p> <p>7 benchmark music works in PSS.</p> <p>8 If you recall, there are three important</p> <p>9 Nash factors: There's a combined agreement surplus;</p> <p>10 the threat points; and the bargaining power. The</p> <p>11 first one is pretty simple. The combined agreement</p> <p>12 surplus would be effectively the same. And the reason</p> <p>13 it would be the same is because it's effectively the</p> <p>14 same market.</p> <p>15 So the amount of profits available to a PSS</p> <p>16 in reaching an agreement with a record label, given an</p> <p>17 existing agreement with the PRO, is roughly going to</p> <p>18 be comparable with the profit available to a PSS</p> <p>19 provider reaching an agreement with a PRO, given an</p> <p>20 agreement with the record label because they're</p> <p>21 effectively the same market. And so the combined</p> <p>22 agreement surplus should be effectively the same.</p>	1798	<p>1 they can't reach an agreement with the PRO, they can't</p> <p>2 offer service. And in both cases their profit is</p> <p>3 zero.</p> <p>4 So the whole material difference in a</p> <p>5 negotiation between a PSS provider and a record label</p> <p>6 and a PSS provider and a PRO is the threat point of</p> <p>7 the copyright owner.</p> <p>8 And so I mentioned earlier there is this</p> <p>9 promotional benefit. Well, it turns out that -- I</p> <p>10 understand that the promotional benefit flows</p> <p>11 differently to record labels versus copyright owners</p> <p>12 of musical works. And so I understand that, for</p> <p>13 example, in the sale of any CD, a record label will</p> <p>14 earn more profit from that sale of the CD than will</p> <p>15 the copyright owner represented by a performing rights</p> <p>16 organization.</p> <p>17 And so because of that difference, the</p> <p>18 threat point, if you remember, is negative. And so it</p> <p>19 will be a bigger negative number for the record label</p> <p>20 than it would be for the PRO. And that's the only</p> <p>21 material difference.</p> <p>22 So the Nash factors are all very similar.</p>
1797	<p>1 Similarly, the bargaining power I believe</p> <p>2 would likely be the same. Now, of course, in the</p> <p>3 hypothetical market, the bargaining power would</p> <p>4 represent the bargaining power of a PSS provider</p> <p>5 negotiating with a record label, and that doesn't</p> <p>6 happen.</p> <p>7 But my understanding is in markets where a</p> <p>8 PSS provider -- in particular, Music Choice -- does</p> <p>9 negotiate with record labels, for example, in the</p> <p>10 rights for music videos that David Del Beccaro has</p> <p>11 indicated that they are -- that the record labels are</p> <p>12 neither more nor less patient than are the PROs in</p> <p>13 those negotiations. So because of that, I assumed the</p> <p>14 bargaining power is also the same. So those two</p> <p>15 things are the same.</p> <p>16 So that's the combined agreement surplus and</p> <p>17 the bargaining power. All that's left is the threat</p> <p>18 point in terms of the Nash factors.</p> <p>19 There's two threat points. The threat point</p> <p>20 for the PSS provider is, again, going to be the same</p> <p>21 in either case. If they can't reach an agreement with</p> <p>22 the record label, they can't offer service. And if</p>	1799	<p>1 The only material difference is the threat point. And</p> <p>2 so the prediction I have comparing outcomes in the</p> <p>3 hypothetical market compared to the target benchmark</p> <p>4 market for the musical works in PSS is that the</p> <p>5 royalty rates should be very similar. But, if</p> <p>6 anything, they should be slightly less for digital</p> <p>7 performing rights for sound recordings than they are</p> <p>8 for digital performing rights for musical works.</p> <p>9 Q Let's go to slide 6.</p> <p>10 JUDGE WISNIEWSKI: Before we get there, just</p> <p>11 one quick question. Dr. Crawford. Aren't you assuming</p> <p>12 here that, in terms of this comparison, if you will,</p> <p>13 that, in fact, the record company in the one market,</p> <p>14 in fact, covers exactly the same songs that the PRO</p> <p>15 covers rights for in the musical works market?</p> <p>16 THE WITNESS: Sure.</p> <p>17 JUDGE WISNIEWSKI: And is that necessarily</p> <p>18 true?</p> <p>19 THE WITNESS: So, again, this is -- these</p> <p>20 are the elements of the complications that I tried to</p> <p>21 abstract away from by having a single record label</p> <p>22 negotiating with a PSS provider versus a single -- the</p>

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1800	<p>1 complementary assumption for the musical works</p> <p>2 benchmark would be the single performing rights</p> <p>3 organization.</p> <p>4 JUDGE WISNIEWSKI: But if, in fact, you</p> <p>5 don't have that match, there is no product produced,</p> <p>6 is there?</p> <p>7 THE WITNESS: No, so -- I mean, I think what</p> <p>8 I would say is -- so as long as -- I'll go back.</p> <p>9 The theory is quite clear on when we expect</p> <p>10 to see bargains reached and when not.</p> <p>11 And so as long as there is a positive pie at</p> <p>12 the end of the day, an agreement will be reached, is</p> <p>13 the prediction of the theory. So the complication --</p> <p>14 I don't mean to minimize the complication you propose,</p> <p>15 but it would -- so I guess what I would say is if we</p> <p>16 can conceive of a world of a single PSS provider</p> <p>17 negotiating with five record labels representing the</p> <p>18 four majors, plus an agglomeration of the others, each</p> <p>19 one of those ought to reach some sort of agreement.</p> <p>20 Now, the catalog for those are going to be</p> <p>21 different than the catalogs for the three performing</p> <p>22 rights organizations. But the thing that really</p>	1802	<p>1 as a benchmark was due to the comparison of the Nash</p> <p>2 factors and their similarity in two markets and,</p> <p>3 therefore, the similarity of their predictions in the</p> <p>4 hypothetical benchmark for sound recordings and in the</p> <p>5 benchmark for musical works.</p> <p>6 Now, let me say, that's not the only reason.</p> <p>7 I found that the previous proceeding's reliance on the</p> <p>8 musical works as a benchmark as supporting evidence of</p> <p>9 that, but it wasn't the primary reason.</p> <p>10 JUDGE ROBERTS: Just so that I know, what</p> <p>11 other markets did you look at besides the musical</p> <p>12 works?</p> <p>13 THE WITNESS: I looked at the -- I'll show</p> <p>14 you later in my testimony an analysis of the sound</p> <p>15 recording market -- excuse me, the digital performance</p> <p>16 rights for sound recording and interactive webcasting,</p> <p>17 so we will talk about those at length in my testimony</p> <p>18 today.</p> <p>19 I briefly looked at S-SCARS, but it seemed</p> <p>20 that interactive webcasting in the previous proceeding</p> <p>21 had been used more regularly as the benchmark, and so</p> <p>22 pretty quickly I settled on the interactive webcasting</p>
1801	<p>1 matters for setting a rate, I think, is sort of the</p> <p>2 aggregate rate, you know, so the rate for -- or the</p> <p>3 addition of the rates across the catalogs of the</p> <p>4 various record labels plus the rates across the</p> <p>5 catalogs of the various PROs, and that if you do that</p> <p>6 aggregation, then that should be the thing that should</p> <p>7 be roughly comparable, even though they have different</p> <p>8 underlying components. I don't know whether that</p> <p>9 answers your question.</p> <p>10 JUDGE WISNIEWSKI: Not exactly, but I didn't</p> <p>11 mean to sidetrack you. Why don't you go ahead and --</p> <p>12 JUDGE ROBERTS: I actually had a question.</p> <p>13 but not on that topic, but before we left the previous</p> <p>14 slide, slide 5 -- I want it to be clear in my mind</p> <p>15 because I think you testified to this earlier -- that</p> <p>16 the reason you choose the musical works benchmark.</p> <p>17 performing rights, was because 14 years ago that's</p> <p>18 what the librarian of Congress used in setting the</p> <p>19 rates with PSS services?</p> <p>20 THE WITNESS: So let me correct -- if that</p> <p>21 was my testimony, let me correct that.</p> <p>22 The primary reason I chose the musical works</p>	1803	<p>1 as my second benchmark that I would consider.</p> <p>2 JUDGE ROBERTS: Did you look at the</p> <p>3 synchronization market for sound recordings?</p> <p>4 THE WITNESS: I did not.</p> <p>5 JUDGE ROBERTS: Why not?</p> <p>6 THE WITNESS: I will be honest. It did not</p> <p>7 occur to me. I was working largely off of previous</p> <p>8 proceedings in the PSS market and related proceedings.</p> <p>9 And so that didn't come up on my radar.</p> <p>10 BY MR. CUNNIFF:</p> <p>11 Q Dr. Crawford, let's, I guess, move on to</p> <p>12 slide 6. I guess, if you could, just fort of briefly</p> <p>13 summarize what you have been talking about with the</p> <p>14 musical works royalties.</p> <p>15 A Sure. So these are my conclusions of -- of</p> <p>16 the analysis I tried to articulate in the last few</p> <p>17 minutes. And so, in my opinion, musical works for</p> <p>18 PSS, for the PSS market, is clearly the most</p> <p>19 appropriate benchmark for the digital performance</p> <p>20 rights for sound recording in PSS.</p> <p>21 And the reason for this is that the Nash</p> <p>22 factors from this market, which are themselves</p>

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1804	<p>1 determined -- the Nash factors are so similar in these</p> <p>2 markets in particular because they have the same</p> <p>3 buyers who sell on the same products. they have,</p> <p>4 strictly speaking, the same rights. digital</p> <p>5 performance rights, although for different works, and</p> <p>6 they sell them on to the same unique cable</p> <p>7 distribution market. And, as I just mentioned, there</p> <p>8 is also this precedent in the previous PSS</p> <p>9 rate-setting proceeding. So those are my two primary</p> <p>10 reasons, the similarity of the Nash factors.</p> <p>11 And my conclusion based on the comparison of</p> <p>12 the Nash factors is that the sound recording royalty</p> <p>13 for PSS should be strictly less than the musical works</p> <p>14 royalty for PSS.</p> <p>15 Q The double brackets there on that number</p> <p>16 means it's restricted, so we will just point to it</p> <p>17 instead of saying it out loud.</p> <p>18 A So it should be -- I believe the sound</p> <p>19 recording royalty in PSS should be less than the</p> <p>20 number listed there in the double brackets.</p> <p>21 Q Thank you, Dr. Crawford.</p> <p>22 Did you look for any empirical evidence to</p>	1806	<p>1 further details in my written testimony.</p> <p>2 So in the UK, in the United Kingdom, cable</p> <p>3 music services are included -- the rates set for cable</p> <p>4 music services I understand are included in the rates</p> <p>5 for terrestrial broadcast radio.</p> <p>6 In the UK market, the royalty rate for sound</p> <p>7 recordings is slightly less than the royalty rate for</p> <p>8 musical works on both -- so if Music Choice were</p> <p>9 offering services in the UK, they would be paying</p> <p>10 slightly less in royalties for sound recordings than</p> <p>11 for musical works.</p> <p>12 Q Do you don't know what those rates are?</p> <p>13 A I believe it's 5 percent for sound</p> <p>14 recordings, and 5-1/4 for musical works.</p> <p>15 Q Is there evidence from the Copyright Board</p> <p>16 of Canada?</p> <p>17 A Yes. The Copyright Board of Canada I</p> <p>18 believe has consistently found -- has consistently set</p> <p>19 royalty rates for both sound recording and musical</p> <p>20 works at equal levels, and furthermore has</p> <p>21 consistently found them to be comparable to each other</p> <p>22 when setting rates.</p>
1805	<p>1 substantiate the relative royalties for musical works</p> <p>2 and sound performance rights?</p> <p>3 A I did. In addition to the previous</p> <p>4 precedent in this proceeding that I have already</p> <p>5 discussed, I also looked internationally.</p> <p>6 Q Why don't we go to slide 7.</p> <p>7 JUDGE ROBERTS: Mr. Cuniff, I'm looking</p> <p>8 where you mentioned there is a restricted number. I'm</p> <p>9 wondering, why is that number restricted?</p> <p>10 MR. CUNIFF: That's a negotiated rate. It</p> <p>11 is the combination of Music Choice's rates with the</p> <p>12 PROs.</p> <p>13 JUDGE ROBERTS: Combination?</p> <p>14 MR. CUNIFF: Currently.</p> <p>15 BY MR. CUNIFF:</p> <p>16 Q Dr. Crawford, is that also your</p> <p>17 understanding?</p> <p>18 A Yes, that is my understanding as well.</p> <p>19 Q Let's go to slide 7. Not much quantitative</p> <p>20 information here. But if you can tell us an overview</p> <p>21 of what empirical evidence you looked for.</p> <p>22 A Sure. I'll just summarize it. There are</p>	1807	<p>1 Q Was there any evidence you looked at from</p> <p>2 broadcast radio in Europe?</p> <p>3 A Yes. So -- this information is slightly</p> <p>4 old. But from a mid-'90s study conducted by</p> <p>5 Music Choice Europe, they surveyed the royalty rates</p> <p>6 for sound recordings as compared to musical works in a</p> <p>7 number of European countries. The average rate for</p> <p>8 sound recordings was slightly less than it was for</p> <p>9 musical works.</p> <p>10 Furthermore, in David Del Beccaro's written</p> <p>11 testimony, he mentioned that they tried to look at</p> <p>12 that again later in 2002, and seemed to find</p> <p>13 comparable results being certainly rates for sound</p> <p>14 recording that were no higher than musical works.</p> <p>15 Q And what conclusions, if any, did you draw</p> <p>16 from observing this empirical evidence?</p> <p>17 JUDGE ROBERTS: Professor Crawford, did you</p> <p>18 look at Germany?</p> <p>19 THE WITNESS: I believe Germany was one of</p> <p>20 the countries in this mid-'90s study. But I don't</p> <p>21 remember the specific number for Germany.</p> <p>22 JUDGE ROBERTS: To understand your chart</p>

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1808	<p>1 here, the UK and Canada, that's not just -- is it</p> <p>2 solely for terrestrial radio?</p> <p>3 THE WITNESS: In the UK, cable audio is part</p> <p>4 of terrestrial radio. In Canada, I believe the cable</p> <p>5 audio had its own rate-setting. I believe. And in</p> <p>6 that rate setting, the two rates are equal.</p> <p>7 JUDGE ROBERTS: Then looking at the European</p> <p>8 Union?</p> <p>9 THE WITNESS: That's back to terrestrial.</p> <p>10 That's purely terrestrial radio.</p> <p>11 JUDGE ROBERTS: You said with respect to</p> <p>12 Germany, you figured it was somewhere in that</p> <p>13 terrestrial area?</p> <p>14 THE WITNESS: I believe there were 13</p> <p>15 countries that were included in the European -- and</p> <p>16 I'm almost certain Germany was one of them.</p> <p>17 JUDGE ROBERTS: You didn't have anything for</p> <p>18 Germany for cable audio?</p> <p>19 THE WITNESS: No.</p> <p>20 JUDGE ROBERTS: Is there a reason for that?</p> <p>21 THE WITNESS: We tried. I had my staff try</p> <p>22 to find royalty rates across these countries and we</p>	1810	<p>1 interactive webcasting market on the right.</p> <p>2 If you recall, earlier I testified that</p> <p>3 there were certain features of an ideal benchmark</p> <p>4 market, including that it would be a marketplace rate,</p> <p>5 it would be the same buyers, it would be the same</p> <p>6 sellers. The buyers would sell similar products to</p> <p>7 consumers, et cetera.</p> <p>8 And if you look at these two markets, you</p> <p>9 can see that there are many material differences</p> <p>10 between the licensing of sound recording rates in the</p> <p>11 PSS market and the interactive webcasting.</p> <p>12 Now, of course, it is the same sellers and</p> <p>13 they are selling the same rights, so that is a</p> <p>14 similarity. But the buyers are very, very different.</p> <p>15 We have a PSS operator, like Music Choice, on the left</p> <p>16 versus an interactive webcaster like Spotify on the</p> <p>17 right.</p> <p>18 In addition, Music Choice doesn't sell</p> <p>19 directly to consumers. They sell through cable</p> <p>20 operators, so they sell their service to cable</p> <p>21 operators, and so the cable operator acts as a</p> <p>22 middleman.</p>
1809	<p>1 weren't able to. It's challenging.</p> <p>2 JUDGE ROBERTS: It's challenging.</p> <p>3 THE WITNESS: Yeah, we weren't able to</p> <p>4 find -- because, obviously, the international data is</p> <p>5 quite dated. So I wanted to update it, but we didn't</p> <p>6 find anything up-to-date that was usable.</p> <p>7 BY MR. CUNNIFF:</p> <p>8 Q Dr. Crawford, let's go ahead and go to</p> <p>9 slide 8 and jump into interactive webcasting, as you</p> <p>10 previewed.</p> <p>11 Did you, in fact, look at the interactive</p> <p>12 webcasting as a potential appropriate benchmark to use</p> <p>13 for the hypothetical market in the PSS?</p> <p>14 A I did.</p> <p>15 Q And what is your opinion on that?</p> <p>16 A Well, in my opinion, it would be an</p> <p>17 inappropriate benchmark.</p> <p>18 Q Can you explain why that is using your slide</p> <p>19 here on number 8?</p> <p>20 A Sure. I tried picture here a comparison</p> <p>21 of -- now we are looking at just sound recording</p> <p>22 rights in both the PSS market on the left and the</p>	1811	<p>1 Furthermore, the cable operator bundles the</p> <p>2 Music Choice service with other television channels,</p> <p>3 and so I've listed a few there on the figure. And so</p> <p>4 the PSS service is part of a TV bundle, whereas an</p> <p>5 interactive webcasting service is on a standalone</p> <p>6 basis right on someone's computer.</p> <p>7 Of course, the way consumers actually</p> <p>8 consume the music is very different. In a PSS market,</p> <p>9 it's much more passive. They do not select the songs.</p> <p>10 The Music Choice channels are preprogrammed, whereas</p> <p>11 for an interactive webcaster, the user has a</p> <p>12 tremendous amount of access and control. They have</p> <p>13 just a large library of songs and they can select</p> <p>14 which ones they want to hear. And very often they</p> <p>15 might also have portability. They might be able to</p> <p>16 take the songs with them on portable music players.</p> <p>17 Not always, but sometimes.</p> <p>18 Q Like we looked at previously, were there</p> <p>19 other markets that significantly affect these --</p> <p>20 A Yes. So this is just a direct comparison</p> <p>21 of, if you like, the primary market -- just like I</p> <p>22 mentioned the Nash bargaining model, combined</p>

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1812	<p>1 agreement surplus matters to the primary market, but</p> <p>2 it's also these related markets that matter. And</p> <p>3 that's another critically important difference between</p> <p>4 the PSS market and the interactive webcasting market</p> <p>5 is the impact of sales within the primary market on</p> <p>6 profits in other markets.</p> <p>7 Q And, again, you mean sales like CD?</p> <p>8 A CD sales and downloads, yes. Whenever I say</p> <p>9 record label sales, I mean CD sales and digital</p> <p>10 downloads. But all that matters is other sources of</p> <p>11 profits that rely on similar rights.</p> <p>12 Q Let's go ahead and go to slide 9 and talk</p> <p>13 about those Nash factors as applied to the interactive</p> <p>14 webcasting market. Again, if you could just walk us</p> <p>15 through this slide, starting with the combined</p> <p>16 agreement surplus.</p> <p>17 A Absolutely. So this slide is meant to be</p> <p>18 analogous to the earlier slide for the PSS market in</p> <p>19 its structure, but very different in its conclusion.</p> <p>20 So, as usual, we start -- so this is now the</p> <p>21 application of Nash bargaining to the interactive</p> <p>22 webcasting market. And so the two parties here would</p>	1814	<p>1 zero, the interactive webcaster, first, because that</p> <p>2 one is easy.</p> <p>3 Like in the PSS market, if an interactive</p> <p>4 webcaster cannot reach an agreement with a record</p> <p>5 label over the licensing of digital performing rights</p> <p>6 for sound recordings, they, too, cannot make any</p> <p>7 profits. And they also don't operate in any other</p> <p>8 markets and so in the absence of an agreement, their</p> <p>9 profits are zero.</p> <p>10 The big difference is in threat point for</p> <p>11 the record label. So whereas before we had a negative</p> <p>12 number for the record label to capture, there was a</p> <p>13 promotional benefit of the PSS service on other</p> <p>14 sources of revenue, for example, CD sales to the</p> <p>15 record labels. Here, I believe there is strong</p> <p>16 evidence that interactive webcasting is cannibalizing</p> <p>17 CD sales; in other words, the international webcaster</p> <p>18 is a substitute for CD sales -- and I'll provide some</p> <p>19 justification for that in a moment, but let me finish</p> <p>20 with what the implication of that would be for threat</p> <p>21 points.</p> <p>22 In that case, in the absence of an</p>
1813	<p>1 be a record label trying to reach an agreement on the</p> <p>2 licensing of digital performance rights for sound</p> <p>3 recordings to an interactive webcaster. We begin,</p> <p>4 again, with a combined surplus.</p> <p>5 I have made -- for reasons that will be</p> <p>6 clear later, I have made the number bigger. It's not</p> <p>7 meant to be precise. But I'm going to argue later</p> <p>8 that I believe the combined surplus in the interactive</p> <p>9 webcasting market is bigger, so I have chosen a bigger</p> <p>10 number.</p> <p>11 And remember what that measures. That</p> <p>12 measures the economic profit to be shared from the</p> <p>13 interactive webcasting market after costs have been</p> <p>14 paid, so we have profit in the interactive webcasting</p> <p>15 market shared between the two parties, between the</p> <p>16 record label and the interactive webcaster.</p> <p>17 So, in concept, the combined surplus isn't</p> <p>18 really any different. It's just it was larger in the</p> <p>19 other market. The threat points, however -- well, one</p> <p>20 is the same, but one is quite different.</p> <p>21 Q Go ahead and explain that to us.</p> <p>22 A Sure. So I'm going to do the one that's</p>	1815	<p>1 agreement -- so if the interactive webcaster and</p> <p>2 record label can reach an agreement, they can earn</p> <p>3 profits of 100. But in the absence of an agreement,</p> <p>4 that profit of 100 comes at the expense of lost CD</p> <p>5 sales.</p> <p>6 So in the absence of an agreement, the</p> <p>7 record label may get as much as 70. They may get --</p> <p>8 yes, they lose the interactive webcasting revenue, but</p> <p>9 they no longer have those lost CD sales.</p> <p>10 Q And then the far right column, the pie to be</p> <p>11 split, let's go ahead and walk through that, if we</p> <p>12 could.</p> <p>13 A Sure. After I go through that right column,</p> <p>14 I'll then provide some evidence on this</p> <p>15 cannibalization point.</p> <p>16 So the pie to be split is, as always, simply</p> <p>17 the combined agreement surplus less the threat points.</p> <p>18 So it's 100 minus 70 and minus zero. So the pie to be</p> <p>19 split is a total of 30. 100 minus 70 is 30.</p> <p>20 I'm, again, for convenience, assuming equal</p> <p>21 bargaining power. I unfortunately don't have much</p> <p>22 information about the bargaining power of interactive</p>

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1816	<p>1 webcasters with record labels, so for the purpose of</p> <p>2 this example, I'm just going to assume equal</p> <p>3 bargaining power. And of that pie to be split of 30,</p> <p>4 if it's going to be split 50/50, each party would get</p> <p>5 15.</p> <p>6 Now, for the interactive webcaster, the 15</p> <p>7 they get comes right out of their revenues. They get</p> <p>8 the 15 from the interactive webcasting market. But</p> <p>9 for the record label to get 15, they are losing 70</p> <p>10 in -- due to the cannibalization of CD sales. So they</p> <p>11 need to get 85 out of the interactive webcasting</p> <p>12 market in order to split equally the total surplus</p> <p>13 available from an agreement.</p> <p>14 So that's why, even though -- so that means</p> <p>15 the royalty rate -- well, so the label's share of the</p> <p>16 interactive webcasting profit is 85 percent, which is</p> <p>17 substantially higher than you might expect given a</p> <p>18 50/50 split, but that's because the record label is</p> <p>19 bearing the costs of the lost CD sales, and the</p> <p>20 interactive webcaster is not.</p> <p>21 As usual, if we were to translate that share</p> <p>22 of profit coming out of the model into a revenue</p>	1818	<p>1 to seek out empirical evidence for a cannibalization</p> <p>2 effect of interactive webcasting. Unfortunately, the</p> <p>3 academic literature doesn't have anything -- I wasn't</p> <p>4 able to find any evidence of cannibalization between</p> <p>5 interactive webcasting and CD sales.</p> <p>6 That being said, there was a substantial</p> <p>7 academic literature on the potential cannibalization</p> <p>8 or substitution between digital downloads and CD</p> <p>9 sales, and that literature has broadly concluded that</p> <p>10 there is an important substitution or cannibalization</p> <p>11 effect in that the more digital downloads we see,</p> <p>12 that's driving consumers away from purchasing CDs. So</p> <p>13 I think that result is fairly robust in the academic</p> <p>14 literature. It's not uniform, but it's there.</p> <p>15 So the challenge then is to try to draw</p> <p>16 conclusions about interactive webcasting based on</p> <p>17 results between digital downloads and CD sales. And</p> <p>18 the way I did this was by drawing on the academic</p> <p>19 literature that suggests the substitutability of</p> <p>20 products is often related to how similar they are.</p> <p>21 So the idea is that if the price of a Range</p> <p>22 Rover goes up, you are more likely to see those</p>
1817	<p>1 royalty rate, we need to have to have some concept of</p> <p>2 what is pre-royalty profit in the interactive</p> <p>3 webcasting market.</p> <p>4 Here, just for the purpose of an example, I</p> <p>5 have assumed the pre-royalty profit is 50 percent of</p> <p>6 revenue, meaning the profits to the interactive</p> <p>7 webcaster not counting royalties paid to the record</p> <p>8 label is 50 percent of revenue. If that's right,</p> <p>9 then, in this simple example, they would earn a</p> <p>10 revenue royalty of 42-1/2 percent.</p> <p>11 Q And how do those Nash bargaining factors in</p> <p>12 the interactive webcasting market compare to our</p> <p>13 hypothetical market with the PSS?</p> <p>14 A Well, before I get there, I would like to</p> <p>15 speak a little bit more about the cannibalization</p> <p>16 because I've assumed cannibalization, but I haven't --</p> <p>17</p> <p>18 Q Sure.</p> <p>19 A -- articulated why. Rather, I concluded</p> <p>20 cannibalization, but I haven't articulated why.</p> <p>21 So much like I testified earlier in</p> <p>22 providing evidence for a promotional effect, I tried</p>	1819	<p>1 consumers substitute to another big SUV than you are</p> <p>2 to see them substitute to a Mini. Right? So the</p> <p>3 closer -- the more similar our products, the more</p> <p>4 likely there are going to be important substitution</p> <p>5 effects.</p> <p>6 And so if you compare digital downloads or</p> <p>7 CDs with interactive webcasting, in my opinion you see</p> <p>8 a lot of similarities. I mentioned some of these</p> <p>9 similarities earlier.</p> <p>10 First you see that they are very active.</p> <p>11 The consumer can choose what songs they're interested</p> <p>12 in playing, whether choosing from their own library or</p> <p>13 choosing from -- choosing to download music or whether</p> <p>14 they go to the millions of songs they have access to</p> <p>15 through an interactive webcaster. They also have</p> <p>16 access to quite a few songs.</p> <p>17 These interactive webcasters have millions</p> <p>18 of songs. Of course, the amount of access you have</p> <p>19 depends on the size of your CD or your digital</p> <p>20 download library. But you certainly have music to</p> <p>21 choose from in these markets. And then it's also</p> <p>22 portable, I mentioned earlier, that at least for some</p>

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1820	<p>1 interactive webcasters, the music that you listen to, 2 you can take with you on your iPods or other similar 3 devices.</p> <p>4 And so because of these similarities between 5 the interactive webcasting market and the CD and 6 digital download market, I concluded that if those two 7 markets are substitutable with each other, it's 8 extremely likely that they are both substitutable also 9 with interactive webcasting.</p> <p>10 Q Thank you, Dr. Crawford.</p> <p>11 Did you look at the differences between the 12 Nash factors in interactive webcasting and the Nash 13 factors in our hypothetical market?</p> <p>14 A I did.</p> <p>15 Q Is there a slide 9 or slide 8?</p> <p>16 A Well, I think it might be useful to go back 17 to slide 8 --</p> <p>18 Q Back to slide 8? Okay.</p> <p>19 A -- just for a moment, just to talk about 20 some of the differences.</p> <p>21 So I testified earlier that one of the 22 reasons I liked the musical works benchmark in the PSS</p>	1822	<p>1 in unrestricted session, so in rough order of 2 magnitude --</p> <p>3 A Yeah, I would say certainly an order of 4 magnitude higher, if not two. So significantly 5 higher. Just leave it at that.</p> <p>6 Q Pennies versus dollars?</p> <p>7 A Yeah, something like that. So that 8 suggested to me that the combined agreement surplus is 9 much larger in the interactive webcasting market.</p> <p>10 And, remember, the combined agreement surplus is 11 before royalty payment. So the fact that interactive 12 webcasters don't make a lot of money now -- if they do 13 or don't, that's not the relevant thing. The relevant 14 thing is before they have to pay royalties, is there 15 surplus there? And that's why I used the larger 16 number in my example. And so that's one important 17 difference.</p> <p>18 But the much bigger important difference, 19 the much more important difference is this difference 20 between the promotional effect of a PSS service and 21 the cannibalization effect of the interactive 22 webcasting service.</p>
1821	<p>1 market is because of the similarity of the Nash 2 factors themselves arising from the similarity in the 3 buyers and the markets that the buyers sell out to and 4 the nature of consumer use, et cetera.</p> <p>5 And so when I did the same comparison 6 between the hypothetical market and the market for 7 sound recordings and interactive webcasting, I noticed 8 significant differences. Some of these difference I 9 have already discussed.</p> <p>10 But for one thing, the fact that the 11 interactive webcasting service is extremely active and 12 not part of a television bundle, so it doesn't have to 13 compete for the viewer's attention, suggests to me the 14 combined agreement surplus is likely to be much larger 15 in the interactive webcasting market than it is in the 16 PSS market. So that's one important difference 17 arising from the difference in the nature of 18 consumption of the ultimate product.</p> <p>19 It's also true that prices are much higher 20 in the interactive webcasting market. The prices paid 21 by consumers are much higher.</p> <p>22 Q What's the magnitude of that? Again, we are</p>	1823	<p>1 And so, as we discussed -- as I testified 2 earlier, I believe there is strong evidence that a PSS 3 service provides a promotional benefit. That tends to 4 reduce royalties for -- that a PSS operator would pay 5 to the record labels, whereas, as we saw in the 6 example, an important cannibalization effect can 7 dramatically increase royalties. So that 8 difference -- not so much -- in the threat point of 9 the two is a significant difference.</p> <p>10 Q What did you conclude about the 11 comparability of royalties for sound recording and PSS 12 based on that comparison?</p> <p>13 A Well, based on these two important 14 differences, all I could safely conclude was that I 15 thought royalty rates would be higher in interactive 16 webcasting than they would be in a PSS market for the 17 digital performance rights for sound recording. I 18 thought they would be higher in interactive 19 webcasting, but I could see -- and potentially much 20 higher. But I could see no way to adequately control 21 for the differences in order to allow digital 22 performance rights for sound recordings and</p>

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1824	<p>1 interactive webcasting to serve as a potential</p> <p>2 benchmark for the same rights in PSS.</p> <p>3 Q As part of your analysis, did you look at</p> <p>4 the relative comparison of musical works and sound</p> <p>5 performance rights in the interactive webcasting?</p> <p>6 A I did. And I forget which related</p> <p>7 proceeding I read this in, but I recall reading --</p> <p>8 Q Let me ask you, would this be in your</p> <p>9 written testimony somewhere?</p> <p>10 A We will just leave that aside. So I did</p> <p>11 compare the predictions of the Nash bargaining</p> <p>12 framework for digital performance rights for sound</p> <p>13 recording and musical works in interactive webcasting</p> <p>14 because I thought it provided an interesting</p> <p>15 counterpoint to the same comparison that we made in</p> <p>16 PSS.</p> <p>17 Q Why is that important?</p> <p>18 A Well -- so much like I walked through the</p> <p>19 differences in the Nash factors between sound</p> <p>20 recording rights and musical works rights in PSS and</p> <p>21 concluded that the musical works rights -- the sound</p> <p>22 recording right should be less than the musical work</p>	1826	<p>1 between a record label and an interactive webcaster</p> <p>2 and a PRO and an interactive webcaster.</p> <p>3 The combined agreement surplus is likely to</p> <p>4 be very similar like it was before. The bargaining</p> <p>5 power is likely to be fairly similar. I have no</p> <p>6 information to indicate it would be greater for one</p> <p>7 party on another. The threat point for the</p> <p>8 interactive webcaster is likely to be the same. They</p> <p>9 can't offer any service without both of those rights.</p> <p>10 So they will have no profit if they can't reach an</p> <p>11 agreement.</p> <p>12 And so, again, the only difference is</p> <p>13 between -- a negotiation between an interactive</p> <p>14 webcaster and a record label versus a PRO is in the</p> <p>15 threat point for the record label and PRO.</p> <p>16 So, again, because -- and the key difference</p> <p>17 here is that, in interactive webcasting, there is this</p> <p>18 cannibalization effect. And so because that</p> <p>19 cannibalization effect applies equally to both rights</p> <p>20 holders, but the record label earns more profit from</p> <p>21 every CD sale than does the copyright owner of musical</p> <p>22 works, the cannibalization's impact on royalties is</p>
1825	<p>1 right in PSS, if you do that same comparison of Nash</p> <p>2 factors in the interactive webcasting market, you</p> <p>3 reach the opposite conclusion. You actually reach the</p> <p>4 conclusion that the royalty rates for digital</p> <p>5 performance rights for sound recordings in interactive</p> <p>6 webcasting should be greater than the royalty rates</p> <p>7 for musical works.</p> <p>8 Q So, in sum -- and pardon me if you said</p> <p>9 this -- but, in essence, what is your opinion as to</p> <p>10 whether interactive webcasting can be used as a</p> <p>11 benchmark rate for PSS?</p> <p>12 A It is my conclusion that interactive</p> <p>13 webcasting -- the royalty rates for sound recording in</p> <p>14 interactive webcasting would not be an appropriate</p> <p>15 benchmark for PSS.</p> <p>16 Q Even if not appropriate as a benchmark, does</p> <p>17 that provide any fee size for us?</p> <p>18 A It does. It might be worth just briefly</p> <p>19 sketching out the justification for my conclusion that</p> <p>20 the sound recording royalties for interactive</p> <p>21 webcasting are higher. It's effectively that --</p> <p>22 again, comparing two different negotiations, one</p>	1827	<p>1 going to be much stronger for the record label than it</p> <p>2 is for the PRO and, therefore, the royalty is going to</p> <p>3 be higher for the record label than the PRO in the</p> <p>4 interactive webcasting market.</p> <p>5 Q I guess looking at the analysis as a whole,</p> <p>6 did you come to any conclusions about the</p> <p>7 predictability of the Nash bargaining model in the</p> <p>8 context of these different markets?</p> <p>9 A I was quite pleased. I thought the Nash</p> <p>10 bargaining model was able to explain many of the</p> <p>11 features that we see in these different markets in a</p> <p>12 single coherent manner.</p> <p>13 Q Dr. Crawford, let's turn to another to</p> <p>14 another topic --</p> <p>15 JUDGE WISNIEWSKI: Before you do, just</p> <p>16 following up on Judge Roberts' earlier questions, you</p> <p>17 had indicated the reasons why you didn't use the</p> <p>18 S-SCARS, for example. I was curious as to why you</p> <p>19 didn't apply the Nash model to any of the other</p> <p>20 competitors that Music Choice has cited.</p> <p>21 THE WITNESS: Can I ask which particular</p> <p>22 competitor you had in mind?</p>

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1828	<p>1 JUDGE WISNIEWSKI: Let's take the Galaxy</p> <p>2 service for example.</p> <p>3 THE WITNESS: Well, in principle, there's --</p> <p>4 I mean, my understanding was I was to think about the</p> <p>5 hypothetical market for PSS service. And so, like,</p> <p>6 Muzak would fall within that framework. Of course,</p> <p>7 Galaxy would not. We certainly could use Galaxy as a</p> <p>8 potential benchmark, although my understanding of</p> <p>9 Galaxy is that it's a relatively new entrant into the</p> <p>10 U.S. market, and my understanding is that it's not</p> <p>11 clear that it's a -- it's not clear that -- I would</p> <p>12 say they are in their long-run equilibrium, that if</p> <p>13 they grow in size, that they will be a viable</p> <p>14 competitor in the cable audio market.</p> <p>15 JUDGE WISNIEWSKI: Mr. Del Beccaro seemed to</p> <p>16 think so.</p> <p>17 THE WITNESS: I would simply say that</p> <p>18 Mr. Del Beccaro and I have different skill sets when</p> <p>19 we look at competition.</p> <p>20 JUDGE WISNIEWSKI: And noninteractive</p> <p>21 webcasters?</p> <p>22 THE WITNESS: I mean, I think primarily I</p>	1830
1829	<p>1 chose the interactive webcasters because they had been</p> <p>2 used as a benchmark market in these previous</p> <p>3 proceedings and, therefore, it seemed most sensible to</p> <p>4 use that as a second potential benchmark.</p> <p>5 But there is certainly nothing that would</p> <p>6 prevent applying these identical methods to look at</p> <p>7 any of these potential benchmarks.</p> <p>8 JUDGE WISNIEWSKI: Thank you.</p> <p>9 BY MR. CUNIFF:</p> <p>10 Q Dr. Crawford, let's go ahead and now talk</p> <p>11 about the statutory factors. In your work on the</p> <p>12 case, did you analyze any of the statutory factors in</p> <p>13 connection with your analysis?</p> <p>14 A I did. So I saw my analysis as consisting</p> <p>15 of two parts, one, the part we've just completed based</p> <p>16 on the Nash bargaining framework and the analysis of</p> <p>17 Nash factors to identify a potential benchmark market.</p> <p>18 That sometimes provides my first set of conclusions</p> <p>19 about the likely royalty rate for a benchmark market.</p> <p>20 But, of course, the statutory factors could be used to</p> <p>21 adjust any benchmark marketplace rate as a</p> <p>22 complementary analysis.</p>	1831
	<p>1 Q I think in shorthand form, you've referred</p> <p>2 to it as one of the factors is the fair return/fair</p> <p>3 income factor; is that correct?</p> <p>4 A Yes. So I looked at two factors in</p> <p>5 particular. I looked at the fair income/fair return,</p> <p>6 and minimizing disruptive impact on the industry</p> <p>7 factor.</p> <p>8 Q And what is your understanding of the fair</p> <p>9 income/fair return factor?</p> <p>10 A My understanding is that it's a second</p> <p>11 factor, and it directs that a reasonable royalty</p> <p>12 should provide the copyright owner with a fair return</p> <p>13 and the copyright user with a fair income.</p> <p>14 Q Did you use analyze Music Choice's financial</p> <p>15 results?</p> <p>16 A I did. And so, basically, I tried to use</p> <p>17 the same Nash factors in conjunction with these two</p> <p>18 policy factors to determine what would be a reasonable</p> <p>19 range of royalties; in other words, a range of royalty</p> <p>20 that would satisfy the policy factors in addition to</p> <p>21 just simply being a royalty coming out of a</p> <p>22 hypothetical marketplace.</p>	

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1832	<p>1 discussed with the accountant on my staff potential</p> <p>2 ways around this.</p> <p>3 And what I understand, from further</p> <p>4 discussions with Music Choice, is it just wasn't</p> <p>5 possible, in part because they just treat the two</p> <p>6 businesses as an integrated business unit.</p> <p>7 But even if one wanted to, the revenue for</p> <p>8 many of the video products are bundled in. In</p> <p>9 particular, Music Choice offers an audio service.</p> <p>10 Their video on-demand service is uniformly included</p> <p>11 with their audio service in licenses to cable</p> <p>12 operators, and there is no way to decompose that. I</p> <p>13 further understand that their SWRV video music channel</p> <p>14 is sometimes included and sometimes not included.</p> <p>15 Q And do you have an understanding whether the</p> <p>16 video portion that's bundled in is necessary for</p> <p>17 Music Choice to remain competitive?</p> <p>18 A So that came out very early in conversations</p> <p>19 with David Del Beccaro, and I believe it's in his</p> <p>20 written testimony, that the -- of course, they started</p> <p>21 as an audio business, but it quickly became clear that</p> <p>22 in order to maintain (sic) a viable service in the</p>	1834	<p>1 MR. CUNNIFF: Your Honor, the good news is I</p> <p>2 don't have too much more with this witness. The bad</p> <p>3 news is I at this point would like to ask we go into</p> <p>4 restricted session. We're going to look at the</p> <p>5 financials. I have tried to group all my questions</p> <p>6 into one part for that.</p> <p>7 CHIEF JUDGE BARNETT: This is the next page?</p> <p>8 MR. CUNNIFF: Slide 10, which comes from</p> <p>9 Music Choice's financial information.</p> <p>10 CHIEF JUDGE BARNETT: This is historical?</p> <p>11 MR. CUNNIFF: This is information that has</p> <p>12 already been part of our motion to be covered by the</p> <p>13 protective order in Dr. Crawford's report.</p> <p>14 Music Choice is not a public company, so this is on</p> <p>15 their financials.</p> <p>16 MR. LEVIN: No objection.</p> <p>17 MS. SINGER: No objection.</p> <p>18 CHIEF JUDGE BARNETT: Anyone who is not</p> <p>19 signatory, please, if you don't mind waiting outside.</p> <p>20 (Whereupon, pages 1835 through 1848 were</p> <p>21 marked confidential and attached under separate</p> <p>22 cover.)</p>
1833	<p>1 market, they needed to include video with it, and so</p> <p>2 it became basically a necessary product in order to</p> <p>3 remain a viable competitor in the market.</p> <p>4 Q Is that consistent with your observations</p> <p>5 and your work with the cable television market?</p> <p>6 A Well, I mean, it's certainly consistent -- I</p> <p>7 am much more familiar with television channels, and</p> <p>8 it's certainly true that this has been very -- the</p> <p>9 last 15 or 20 years has been a very dynamic time in</p> <p>10 the cable marketplace with many channels investing</p> <p>11 significant sums of money in original programming.</p> <p>12 I mean, the sets of things channels invest</p> <p>13 in differ depending on the content they provide, but</p> <p>14 it definitely seems to be a -- a dynamic, competitive</p> <p>15 marketplace where channels are investing in providing</p> <p>16 high-end quality services as a backdrop against which</p> <p>17 Music Choice is making its own decisions.</p> <p>18 Q In effect, you are running faster just to</p> <p>19 stay in the same place?</p> <p>20 A Like the Red Queen, yes.</p> <p>21 Q Dr. Crawford, let's turn to page 10, slide</p> <p>22 10.</p>	1835	<p>1</p> <p>2</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p>

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1849	1851
<p>1 CHIEF JUDGE BARNETT: Thank you.</p> <p>2 BY MR. CUNNIFF:</p> <p>3 Q I'm sorry, Dr. Crawford. I believe I</p> <p>4 interrupted you. Can you give us your understanding</p> <p>5 of the minimized disruptive impact?</p> <p>6 A My understanding is this is the fourth</p> <p>7 policy factor. The policy factor asks -- establishes</p> <p>8 that a reasonable rate should minimize the disruptive</p> <p>9 impact to industry. I believe that's the key text.</p> <p>10 And so my reading of that is that there is a</p> <p>11 significant asymmetry between the record labels and</p> <p>12 PSS providers and Music Choice in particular in the</p> <p>13 potential for this disruptive impact.</p> <p>14 So, in particular, because royalty revenues</p> <p>15 from PSS services are such a small portion of a record</p> <p>16 label's total revenues, I concluded that there is no</p> <p>17 chance that increases or decreases -- I conclude that</p> <p>18 it's very unlikely that the royalty rate in my fair</p> <p>19 range would provide a disruptive impact on the record</p> <p>20 labels.</p> <p>21 On the other hand, based on my analysis,</p> <p>22 even the existing royalty rate is not the -- at least</p>	<p>1 Music Choice to go out of business would have a</p> <p>2 significantly disruptive impact on the cable audio</p> <p>3 market.</p> <p>4 Q Dr. Crawford, thank you. If you could just</p> <p>5 very briefly just sum up your opinions for us.</p> <p>6 A Sure.</p> <p>7 JUDGE WISNIEWSKI: Let me follow up on that.</p> <p>8 You say on the cable market, but, in fact, you are</p> <p>9 really only talking about the PSS portion of the cable</p> <p>10 market, correct?</p> <p>11 THE WITNESS: I am. But I have -- the way I</p> <p>12 look at the cable audio market is that there are not</p> <p>13 any other standalone viable providers that are clear</p> <p>14 to be long-run viable providers -- this Galaxy point</p> <p>15 aside -- you can see why I'm qualifying -- in the</p> <p>16 cable audio market.</p> <p>17 JUDGE WISNIEWSKI: Thank you.</p> <p>18 MR. CUNNIFF: That's all I have, Your Honor.</p> <p>19 JUDGE ROBERTS: Mr. Levin, are you really</p> <p>20 going to make any headway in 15 minutes?</p> <p>21 MR. LEVIN: I'll make 15 minutes of headway.</p> <p>22 JUDGE ROBERTS: Is that going to be so</p>

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1852	<p>1 disjointed to throw us off tomorrow? It's your call.</p> <p>2 I'm just inquiring.</p> <p>3 In other words, I'm saying can you hit a</p> <p>4 topic or two in the 15 minutes you have so we aren't</p> <p>5 left hanging?</p> <p>6 MR. LEVIN: I suppose my question would be,</p> <p>7 if I don't start, will the 15 minutes be charged to</p> <p>8 SoundExchange?</p> <p>9 JUDGE ROBERTS: Yes.</p> <p>10 MR. LEVIN: Then I think I'd prefer to start</p> <p>11 and do my best not to leave anybody hanging in</p> <p>12 suspense.</p> <p>13 CROSS-EXAMINATION</p> <p>14 BY MR. LEVIN:</p> <p>15 Q Good afternoon, Dr. Crawford.</p> <p>16 A Good afternoon.</p> <p>17 Q Nice to see you again.</p> <p>18 A Thank you.</p> <p>19 Q Dr. Crawford, you understand that this</p> <p>20 proceeding will establish the royalty rated for</p> <p>21 Music Choice's residential audio service; is that</p> <p>22 correct?</p>	1854	<p>1 Q And you are aware that, in both of those</p> <p>2 cases, this court rejected the musical works rate as a</p> <p>3 benchmark, correct?</p> <p>4 A That's correct.</p> <p>5 Q And in both of these other cases, the court</p> <p>6 instead used the interactive webcasting royalty rate</p> <p>7 as a benchmark, correct?</p> <p>8 A That is my understanding, yes.</p> <p>9 Q Now, in paragraph 100 which is on page 31 of</p> <p>10 your testimony, in the first sentence of that</p> <p>11 paragraph, you conclude that the use of the</p> <p>12 interactive webcasting benchmark to set the webcasting</p> <p>13 royalty rate and the satellite radio royalty rate</p> <p>14 seemed to be favorable for those two markets, correct?</p> <p>15 A That's correct.</p> <p>16 Q In other words, you agree that the musical</p> <p>17 works rate was not the appropriate benchmark for those</p> <p>18 services?</p> <p>19 A Well, that's -- so I think the way I</p> <p>20 would -- it's rather more than it's -- I wrote that</p> <p>21 sentence not so much as a conclusion based on a</p> <p>22 detailed analysis on the suitability of the musical</p>
1853	<p>1 A That's correct.</p> <p>2 Q Is it fair to say that the primary</p> <p>3 conclusion of your testimony is that the sound</p> <p>4 recording performance royalty rate for the PSS should</p> <p>5 be less than the royalty rate for the performance of</p> <p>6 musical works for Music Choice?</p> <p>7 A For the PSS, yes.</p> <p>8 Q But the number you actually use is from</p> <p>9 Music Choice?</p> <p>10 A That's correct.</p> <p>11 Q And, in your opinion, the musical works rate</p> <p>12 that Music Choice pays is the best benchmark for</p> <p>13 setting the sound recording royalty?</p> <p>14 A Yes.</p> <p>15 Q You are aware that, in the first two</p> <p>16 proceedings held before this court, colloquially known</p> <p>17 as the Webcasting II proceeding and the SR I</p> <p>18 proceeding, the statutory licensees argued for</p> <p>19 adoption of the musical works rate as a benchmark for</p> <p>20 setting a reference for the sound recording music</p> <p>21 rates for those services?</p> <p>22 A I believe that's right.</p>	1855	<p>1 works rate for sound recording rates in each of those</p> <p>2 two markets, but rather just that there seemed to be a</p> <p>3 precedent for it, that the judges had concluded it.</p> <p>4 So it was more a discussion of the previous findings</p> <p>5 rather than my own analysis.</p> <p>6 Q Your conclusion that the musical works rate</p> <p>7 is the best benchmark for the PSS service is based on</p> <p>8 your application of the Nash bargaining framework,</p> <p>9 correct?</p> <p>10 A In this setting, yes.</p> <p>11 Q But the final range of rates that you</p> <p>12 propose as a reasonable range of rates is derived from</p> <p>13 your financial surplus analysis, correct?</p> <p>14 A With some qualifications, yes.</p> <p>15 Q And you considered your financial surplus</p> <p>16 analysis to be corroborative of your conclusion that the</p> <p>17 sound recording performance royalty rate should</p> <p>18 clearly be less than the musical works rates for the</p> <p>19 PSS?</p> <p>20 A If I may state my conclusions, I think that</p> <p>21 the application of the Nash factors for musical works</p> <p>22 in PSS, and comparing those to same application of the</p>

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1856	<p>1 Nash factors for sound recording in PSS suggests that</p> <p>2 the musical works rate should be an upper bound</p> <p>3 compared to the sound recording rates. That's my</p> <p>4 primary conclusion based on the Nash factors.</p> <p>5 Then, as a supplementary conclusion, to</p> <p>6 predict a particular range that incorporates the Nash</p> <p>7 factors, then I rely on Music Choice's financial</p> <p>8 statements.</p> <p>9 Q So you used the financial surplus analysis</p> <p>10 to corroborate your conclusion that the musical rates</p> <p>11 was a good benchmark, correct?</p> <p>12 A To provide complementary evidence.</p> <p>13 Q If your surplus analysis had resulted in a</p> <p>14 significantly greater amount of residual earnings than</p> <p>15 was shown in this slide on the demonstrative, and</p> <p>16 subtracted a percentage of Music Choice's audio</p> <p>17 revenue which would then be split between Music Choice</p> <p>18 and SoundExchange, would you have considered that</p> <p>19 analysis to be corroborative of your Nash bargaining</p> <p>20 framework?</p> <p>21 A So that would be appear to be inconsistent</p> <p>22 evidence with my primary conclusion in the Nash</p>	1858	<p>1 say.</p> <p>2 Q In preparing your report, you instructed a</p> <p>3 colleague of yours at Bates White to collect financial</p> <p>4 statements related to the -- to Music Choice's</p> <p>5 residential audio service, correct?</p> <p>6 A That's correct.</p> <p>7 Q And that colleague used the information to</p> <p>8 prepare the -- to produce the spreadsheets under your</p> <p>9 direction that are contained in appendix B to your</p> <p>10 testimony?</p> <p>11 A That's correct. I directed what I wanted,</p> <p>12 and he produced them for me.</p> <p>13 Q And am I correct that appendix B3, which is</p> <p>14 on page 61 of your testimony, contains the final</p> <p>15 calculations that resulted in your determination of</p> <p>16 Music Choice's residual earnings each year, after</p> <p>17 accounting for Music Choice's rates of return and the</p> <p>18 royalties paid to SoundExchange?</p> <p>19 Page 62. I apologize.</p> <p>20 A Yes. That's correct. There is a typo in</p> <p>21 the table, but otherwise, yes.</p> <p>22 Q This table is the unsummarized version of</p>
1857	<p>1 bargaining framework.</p> <p>2 Q And if your surplus analysis had resulted in</p> <p>3 a negative number in the time period you looked at,</p> <p>4 expressed as a percentage of Music Choice's revenue,</p> <p>5 would you be recommending that Sound Exchange pay</p> <p>6 Music Choice under the statutory license?</p> <p>7 A Well, it's tricky because -- not</p> <p>8 necessarily, because, of course, what -- what we're --</p> <p>9 what I'm looking for in the financial analysis is a</p> <p>10 prediction of sort of future events. And so I'm</p> <p>11 relying on the history of Music Choice's financial</p> <p>12 statements as a forecast of what could be. Even if it</p> <p>13 was the case that residual earnings were negative, I</p> <p>14 mean, we certainly wouldn't want that to be a long-run</p> <p>15 phenomenon. Right? But I wouldn't -- so I wouldn't</p> <p>16 necessarily conclude that Music Choice should go out</p> <p>17 of business.</p> <p>18 You have to allow for uncertainties about</p> <p>19 the estimates of financial statements. You have to</p> <p>20 allow for Music Choice to make changes in their</p> <p>21 business operations to try to maintain viability.</p> <p>22 et cetera. I mean, it wouldn't be conclusive, I would</p>	1859	<p>1 the slide in the demonstrative that you and</p> <p>2 Mr. Cuniff were talking about, correct?</p> <p>3 A That's correct.</p> <p>4 Q The data regarding Music Choice's operating</p> <p>5 income is drawn from Music Choice's 2006 to 2010</p> <p>6 income statements and balance sheets for its</p> <p>7 residential music service, correct?</p> <p>8 A It's drawn from what Music Choice provided</p> <p>9 to us as their income statements and balance sheet</p> <p>10 from the residential music service business, yes.</p> <p>11 Q And you understand that Music Choice's</p> <p>12 residential music service is comprised of the audio</p> <p>13 service that is subject to this statutory license as</p> <p>14 well as separately licensed video services, correct?</p> <p>15 A Well, I understand that it's a single</p> <p>16 business unit that offers multiple services.</p> <p>17 Q Your intention in your testimony was to</p> <p>18 distinguish between the residential audio service and</p> <p>19 any of Music Choice's other services, correct?</p> <p>20 A That's how I wanted to start, yes.</p> <p>21 Q And either you or Mr. Day, your colleague at</p> <p>22 Bates White, you were told by someone in</p>

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1860	<p>1 Music Choice's financial hierarchy that audio and</p> <p>2 video portions of the residential service were</p> <p>3 integrated and that, as a result, costs could not be</p> <p>4 split out. correct?</p> <p>5 A Well, so what we were told was that the</p> <p>6 decisions were made -- there are two things that we</p> <p>7 were told that limited our ability to break out the</p> <p>8 audio and video services. First, we were told that it</p> <p>9 was an integrated business unit; that is, that the</p> <p>10 residential music business for Music Choice involved</p> <p>11 audio, it involved video, they made the decisions for</p> <p>12 the business as a single unit and so, from the</p> <p>13 Music Choice perspective, they were treated similarly.</p> <p>14 Furthermore, because some of the revenue --</p> <p>15 and as I just mentioned in my direct testimony,</p> <p>16 because one of the video services is always included</p> <p>17 with the audio service -- and that's the video</p> <p>18 on-demand service -- and that one of the other</p> <p>19 services is sometimes included with the audio service</p> <p>20 in a single price, that it was just simply not</p> <p>21 probable to break out the revenues.</p> <p>22 MR. LEVIN: If I could, I would like to show</p>	1862	<p>1 the restricted, can we maybe get to this tomorrow and</p> <p>2 fix it?</p> <p>3 MR. LEVIN: I would be okay with that.</p> <p>4 Apologize to Judge Roberts.</p> <p>5 CHIEF JUDGE BARNETT: We will reconvene at</p> <p>6 9:30 in the morning. Thank you.</p> <p>7 MR. HANDZO: Your Honor, with respect to the</p> <p>8 designated testimony that SiriusXM provided this</p> <p>9 morning, we agreed we are going to review it. We</p> <p>10 didn't set a time to do that. I have been instructed</p> <p>11 by the people who are actually going to do the work,</p> <p>12 to ask if we can provide that to you by Monday.</p> <p>13 CHIEF JUDGE BARNETT: That's fine.</p> <p>14 MR. HANDZO: Then the second question was to</p> <p>15 ask Judge Roberts what the time is?</p> <p>16 JUDGE WISNIEWSKI: I have a question for</p> <p>17 you, too, Mr. Handzo.</p> <p>18 JUDGE ROBERTS: Why don't you go ahead and</p> <p>19 ask the question.</p> <p>20 JUDGE WISNIEWSKI: Basically -- it's not</p> <p>21 only for Mr. Handzo, but my understanding is that we</p> <p>22 will continue with Dr. Crawford tomorrow morning. I</p>
1861	<p>1 a document to the witness.</p> <p>2 BY MR. LEVIN:</p> <p>3 Q Dr. Crawford, do you recall that I took your</p> <p>4 deposition in late February of this year?</p> <p>5 A I do.</p> <p>6 Q We have handed to you what has been marked</p> <p>7 as SoundExchange Trial Exhibit 63.</p> <p>8 A Yes.</p> <p>9 Q Is this the transcript of that deposition?</p> <p>10 A It looks to be, yes.</p> <p>11 MR. LEVIN: Your Honor, it appears. based on</p> <p>12 what Dr. Crawford is flipping through, that he has a</p> <p>13 version -- the parties agreed to designate certain</p> <p>14 parts as restricted. It appears that he has a version</p> <p>15 that does not reflect the final restricted</p> <p>16 designation. I have in front of me a copy that does.</p> <p>17 MR. FAKLER: Mine doesn't.</p> <p>18 MR. LEVIN: Before we actually submit the</p> <p>19 exhibit, we will ensure that Trial Exhibit 63 is the</p> <p>20 version that has it.</p> <p>21 MR. FAKLER: Since we are about to end for</p> <p>22 the day and since it would aid us immeasurably with</p>	1863	<p>1 believe I heard earlier that Mr. Del Beccaro was not</p> <p>2 scheduled to come back until Thursday; is that</p> <p>3 correct?</p> <p>4 MR. FAKLER: That is correct, Your Honor.</p> <p>5 JUDGE WISNIEWSKI: So if we finish tomorrow</p> <p>6 with Dr. Crawford, where are we going next?</p> <p>7 MR. LEVIN: SoundExchange will call its</p> <p>8 first witness, Steven Brian.</p> <p>9 JUDGE WISNIEWSKI: Thank you.</p> <p>10 MR. HANDZO: I think we have the order after</p> <p>11 that.</p> <p>12 MR. LEVIN: We will also have available</p> <p>13 Charles Ciongoli and Raymond Hair tomorrow.</p> <p>14 MR. HANDZO: I don't mean to rush the</p> <p>15 calculation. We can get it tomorrow morning, if that</p> <p>16 is easier.</p> <p>17 JUDGE ROBERTS: Services have consumed 21</p> <p>18 hours, 15 minutes. SoundExchange, 17 hours.</p> <p>19 MR. HANDZO: Thank you.</p> <p>20 (Whereupon, the proceedings</p> <p>21 were adjourned.)</p> <p>22</p>

1864	
1 CERTIFICATE OF REPORTER	
2	
3 I, MATTHEW P. SPOUTZ, Court Reporter and	
4 Notary Public, certify that I was authorized to and	
5 did stenographically report the proceedings,	
6 and that the transcript is a true record of my	
7 stenographic notes.	
8 I further certify that I am not a relative,	
9 employee, attorney, or counsel of any of the parties,	
10 nor am I a relative or employee of any of the parties'	
11 attorneys or counsel connected with the action, nor am	
12 I financially interested in the action.	
13 Dated this 12th day of June, 2012.	
14	
15 _____	
16 MATTHEW P. SPOUTZ, Shorthand Reporter	
17	
18	
19	
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6 and that the transcript is a true record of my
7 stenographic notes.

8 I further certify that I am not a relative,
9 employee, attorney, or counsel of any of the parties,
10 nor am I a relative or employee of any of the parties'
11 attorneys or counsel connected with the action, nor am
12 I financially interested in the action.

13 Dated this 12th day of June, 2012.

14

15

16 MATTHEW P. SPOUTZ, Shorthand Reporter

17

18

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20

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22



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